S. Hrg. 100-1011, Pt. 3

NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

THE NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

SEPTEMBER 15, 16, 17, 18, 19, 21, 22, 23,
25, 28, 29, AND 30, 1987

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NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

MONDAY, SEPTEMBER 28, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:07 a.m., in room SR-325, Russell Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Thurmond, Kennedy, Heflin, Humphrey, Specter, Leahy, Hatch, DeConcini, and Simpson.

The **CHAIRMAN**. The hearing will come to order.

Our first panel this morning has two witnesses. First, Senator Thomas Eagleton, who distinguished himself in this body for many years representing the great State of Missouri; and I should add that the hallmark of Senator Eagleton's career in the Senate was his consideration of the separation of powers between the executive and legislative branches. And with recent events in the Persian Gulf, we should also recall that Senator Eagleton was one of the principal architects in the debate on the War Powers Act.

Second, Professor Cass Sunstein, professor of law at the University of Chicago Law School.

Gentlemen, would you stand to be sworn?

Do you swear the testimony you are about to give will be the whole truth and nothing but the truth, so help you, God?

Senator **EAGLETON**. I do.

Mr. **SUNSTEIN**. I do.

Senator **THURMOND**. Mr. Chairman, are you adhering to the 5-minute rule today?

The **CHAIRMAN**. We will adhere to the 5-minute rule today.

Senator **KENNEDY**. Mr. Chairman, is that with regard to questions, or in terms of the presentations?

The **CHAIRMAN**. What I would suggest is that that is with regard to questions and to panels. I will not, out of deference to a former colleague, keep him to 5 minutes; we will keep this to 10 minutes.

So we will begin with Senator Eagleton.

TESTIMONY OF A PANEL CONSISTING OF: HON. THOMAS F. EAGLETON, AND CASS R. SUNSTEIN

Senator EAGLETON. Thank you, Mr. Chairman. I appreciate your invitation to be here today, and I will try to do it within 5 minutes.

There is one thing on which all of us in this hearing room can agree. In this 200th birthday year of the Constitution, this hearing on the confirmation of Judge Bork has been the best lesson in constitutional history that the country could receive.

Part of that constitutional history tells us that during the period of the Articles of Confederation, the fledgling and stumbling not-so-United States suffered mightily for the lack of a strong executive.

The Founding Fathers corrected that and created a strong federal executive. And I am for a strong federal executive. But the Fathers also created a strong Congress and a strong system of federal courts. The Founding Fathers created a balanced government.

Judge Bork remembers only the first of that three-part power-sharing relationship. He remembers only the strong executive. And whenever there is a clash between the executive and the legislature, he decides in favor of an overwhelmingly powerful executive—as it were, the second coming of George III. Let me illustrate.

WAR POWERS

Judge Bork has already declared his antipathy to the Act both as public policy and constitutional doctrine.

Let us pass the policy question and spend a minute on the constitutional doctrine issue. Judge Bork, with all of his purported adherence to "original intent", forgets that the Founding Fathers deliberately decided that matters relating to war and the use of American military forces are shared powers, just as, I might add, the nomination and confirmation of Supreme Court Justices are shared powers between the President and the Congress.

The Constitution gives Congress a grave responsibility in determining where and how American armed forces are to be deployed under threat of hostile action—for example, the Persian Gulf, and perhaps someday, God forbid, Nicaragua.

Judge Bork says: No. It is all up to the President.

I urge Judge Bork to read Article I, Section 8 of the Constitution, where the various foreign policy powers of the Congress are spelled out. Once again, Judge Bork's views are vintage George III, and the Founding Fathers wanted no more of vintage George III.

FOREIGN INTELLIGENCE SURVEILLANCE ACT

The same answer. Once more this is, to Judge Bork, purely, solely and exclusively the executive's function. Judge Bork believes that Congress has no role in intelligence matters; Congress ought to keep its nose out of it, and the courts, too, for that matter, because the courts are too stupid to figure it out anyway. See his Wall Street Journal article in 1978. Leave all of this up to the administration's aides; leave it up to Bill Casey's seasoned and cautious vision.

SPECIAL PROSECUTOR

Judge Bork used to boil over on this one. He had to fire one, and he had to hire and deal with a new one. I do not question Judge Bork's role in the Saturday night massacre. I do question his constitutional notion that the Founding Fathers intended that only Ed Meese could make a good and responsible investigation of Ed Meese.

STANDING

One thing I have to concede to Judge Bork—he is blunt. As far as Congress ever having standing to challenge anything under the sun that the executive branch might do or withhold, Judge Bork says, in the *Barnes* case, "We ought to renounce outright the whole notion of Congressional standing."

That is it—never, no time, nowhere, no way, can Congress challenge the President in any court of law; sort of an imperial Presidency—more, one might say, of George III.

In short, Mr. Chairman, when it is a dispute between the President and the Congress, as far as Judge Bork is concerned, the President is always right, and Congress should always be deprived of its power to challenge him in court—even on matters of deep institutional conflict, like the pocket veto case brought by, among others, the then Republican majority leader and current chief of staff for the President, Howard Baker.

CONCLUSION

Judge Bork believes not just in a powerful President, but in an omnipotent President. This may be the vogue of contemporary conservatism with Ronald Reagan in the White House. But the political pendulum can and will someday swing. An omnipotent conservative President can be succeeded by an omnipotent liberal President.

Those conservatives who today may revel in Judge Bork's constitutional notion that the President can do no wrong, tomorrow may rue the day that they took an oath to such a dogma. Senator Humphrey may consider and shudder that someday his colleague Senator Kennedy might be in the White House as that omnipotent President.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, and you stayed within 5 minutes. I congratulate you on the substance of your comments and also the length of time you took.

[Statement of Senator Thomas Eagleton follows:]

STATEMENT

THOMAS F. EAGLETON
former United States Senator (D., Mo.)

University Professor of Public Affairs
Washington University, St. Louis, Missouri

before

Committee on the Judiciary

United States Senate

Mr. Chairman:

There is one thing on which all of us in the hearing room can agree: In this 200th birthday year of the Constitution, this hearing on the confirmation of Judge Bork has been the best lesson in constitutional history that the country could receive.

Part of that constitutional history tells us that during the period of the Articles of Confederation, the fledgling and stumbling United States suffered mightily for the lack of a strong executive. The Founding Fathers corrected that and created a strong federal executive. I am for a strong executive. But the Fathers also created a strong Congress and a strong system of federal courts. The Founding Fathers created a balanced government.

Judge Bork remembers only the first of that three-part, power-sharing relationship. He remembers only the strong executive and whenever there is any clash between the executive and the legislature, he decides in favor of an overwhelmingly powerful executive -- the second coming of George III.

Let me illustrate.

War Powers.

Judge Bork has already declared his antipathy to the Act both as public policy and constitutional doctrine. Let's pass the policy question and spend a minute on constitutional doctrine.

Judge Bork, with all of his purported adherence to "original intent," forgets that the Founding Fathers deliberately decided that matters relating to war and the use of American military forces are _shared_ powers -- just as, I might add, the nomination and confirmation of Supreme Court justices are _shared_ powers between the President and the Congress.

The Constitution gives Congress a grave responsibility in determining where and how American armed forces are to be deployed under threat of hostile action -- the Persian Gulf or Nicaragua, for example. Judge Bork says: No, it's all up to the President. I urge Judge Bork to read Article I, Section 8 of the Constitution, including the clauses "Congress shall have Power ... to declare War ... and to make Rules for the Government and Regulation of the land and naval Forces."

Once again, his views are vintage George III and the Founding Fathers wanted no more vintage George III.

Foreign Intelligence Surveillance Act.

Same answer -- once more this is, to Judge Bork, purely, solely, and exclusively the executive's function. Congress ought to keep its nose out of it and the court's too for that matter, because the courts are too stupid to figure it out anyway. (See _Wall Street Journal_, March 9, 1978). Leave all of this up to the administration's aides; leave it up to Bill Casey's seasoned and cautious vision.

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Judge Bork used to boil over on this one. He had to fire one and had to hire and deal with a new one. I do not question Judge Bork's role in the Saturday Night Massacre. I do question his constitutional notion that the Founding Fathers intended that only Ed Meese could make a good and responsible investigation of Ed Meese.

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> "We ought to renounce outright the whole notion of congressional standing." (Barnes v. Kline)

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Conclusion.

Judge Bork believes not just in a powerful President, but in an omnipotent President. This may be the vogue of contemporary conservatism with Ronald Reagan in the White House. But the political pendulum can and will, someday, swing. An omnipotent conservative President can be succeeded by an omnipotent liberal President.

Those conservatives who today may revel in Judge Bork's constitutional notion that the President can do no wrong, tomorrow may rue the day that they took an oath to such a dogma. Senator Hatch must consider and shudder that someday his colleague Senator Kennedy might be in the White House as the all-powerful President.

The CHAIRMAN. Professor Sunstein?

TESTIMONY OF CASS SUNSTEIN

Mr. SUNSTEIN. Thank you, Mr. Chairman. I will try also to stay within 5 minutes.

My subject also is that of Executive power, the power of the President, an issue that has received very little attention thus far in the course of these hearings.

Justice Scalia, in his own confirmation hearings, testified that it is the system of checks and balances, of separation of powers, that even more than the system of individual rights has been responsible for freedom under our Constitution.

I think that in so saying, Justice Scalia spoke for the attitude of many Americans toward the system of checks and balances. During the last 10 years, much of the Supreme Court's docket—this is surprising to some—but much of the Supreme Court's docket has involved issues of checks and balances, and there is every reason to believe that in the next 10 years, checks and balances will also play a central role.

The events of the last 6 months—even the events of the last 6 days—attest to the continuing importance of checks and balances in current constitutional controversies.

Now, I will be basing these remarks on Judge Bork's views on separation of powers, not on his work as a law professor, where he has been said to have been paid to be provocative. These remarks will be directed to his work as a witness before the Senate, often before this very committee, and his performance as a lower court judge. These are his remarks as a public official or as a quasi-public official.

There are two general lessons to be drawn from Judge Bork's work on separation of powers. The first is that in this context Judge Bork does not believe in judicial restraint. Let me say that again. In this context, Judge Bork does not believe in judicial restraint.

In the area of individual rights, Judge Bork is well-known for interpreting the Constitution narrowly, out of deference to majorities, in particular out of deference to the Congress.

In the area of checks and balances, Judge Bork has construed the Constitution aggressively. There is no record of deference to the Congress. Indeed, in this area, Judge Bork has often opposed the Congress in contexts in which the text of the Constitution and the intent of the framers of the Constitution—the original intent—seemed to argue precisely in the opposite direction. One sees little attentiveness to the intent of the framers, to history, or to the constitutional text in Judge Bork's work on separation of powers. Here, he favors an aggressive judicial role and aggressive use of the Constitution. This is, as I say, a striking contrast with his work on individual rights.

The second point is a related one, and that is that in contests between the President and Congress, Judge Bork has fairly consistently—not always, but fairly consistently—favored the President. This has distinguished him from many conservatives and moderates as well as liberals, who have supported efforts by Congress to redress the constitutional balance. Often in the past decade, Congress has passed legislation designed to recapture some of the authority—both in the domestic arena and in the foreign arena—to recapture authority that was Congress' under the original constitutional framework.

Those efforts by Congress, those initiatives, have been viewed hospitably by most observers, including of course most Members of Congress. Judge Bork has often been distinctive, almost unique, in suggesting that those efforts to redress the constitutional balance are themselves affirmatively unconstitutional.

Now I would like to support these views just with a few illustrations. I will almost list them.

Judge Bork has suggested an expansive reading of executive privilege.

Judge Bork has opposed the Special Prosecutor Act on constitutional grounds, and his objection goes to the heart of the Act as it currently stands. Judge Bork's objection to the Special Prosecutor Act is unsupported by the text of the Constitution; indeed, it flies in the face of the text of the Constitution. It is unsupported by precedent. The best precedent we have on point is a unanimous decision indicating strongly that the Independent Counsel Act is constitutional.

Judge Bork was, I believe, actually unique in opposing the Foreign Intelligence Surveillance Act on constitutional grounds. That was a statute supported by then Attorney General Edward Levi, supported by the CIA, and supported by the Department of Justice. Judge Bork has also, as recently as 2 weeks ago, suggested that the War Powers Resolution may be unconstitutional—again, a conclusion that is difficult to reconcile with the text of the Constitution, which gives to Congress, not to the President, the power to declare war.

Mr. Chairman, let me conclude by suggesting that none of Judge Bork's reasoning in these cases is irresponsible; none of his reasoning is unsupported. All of his conclusions are plausible. Nonetheless, the pattern is clear. In this area, I believe that Judge Bork's positions are a legitimate source of concern for conservatives, moderates and liberals interested in the system of checks and balances.

Thank you.

[Statement of Professor Cass R. Sunstein follows:]

STATEMENT OF CASS R. SUNSTEIN

PROFESSOR OF LAW

UNIVERSITY OF CHICAGO LAW SCHOOL

Mr. Chairman and Members of the Committee:

I will be speaking today about the views of Supreme Court Nominee Judge Robert H. Bork on the constitutional system of checks and balances--in particular, on the relationship between Congress and the President. In his own confirmation hearings, Justice Scalia suggested that it was the structure created by the Constitution, as much as or more than the bill of rights, that is responsible for freedom in America. A nominee's views on issues of governmental structure often receive little attention, but they are extraordinarily important. I believe that Judge Bork's approach to the system of checks and balances, and in particular to presidential power, should be a source of concern to conservatives, liberals, and moderates alike. This is so especially in light of the fact that constitutional controversies between the President and Congress have been so frequent in the recent past, and are likely to play an enormous role in constitutional law in the near future.

Let me begin with some preliminary points. My statement here is a narrow one, attempting to describe and evaluate Judge Bork's work in a particular area. I do not deal with such issues as the function of the framers' intent in constitutional law, Judge Bork's position on individual rights, the appropriate roles of the President and the Senate in the confirmation process, or Judge Bork's constitutional theory in general.

It is also important to keep in mind that Judge Bork's views, as set out here, are based largely on his testimony before Congress--sometimes as an official of the executive branch--and his opinions as a lower court judge. It is possible that Judge Bork's views have changed, or that as a Supreme Court Justice, Judge Bork's positions would be different from those that he has expressed in different institutional capacities. As you are well aware, it is difficult to predict the behavior of a newly appointed Justice of the Supreme Court.

It is important as well to emphasize that my remarks here do not bear on Judge Bork's ability or character. Indeed, the high regard in which Judge Bork's ability and character should be and are in fact held makes public criticism of his views an exceedingly unpleasant task. And I emphasize that Judge Bork's positions, here as elsewhere, are far from unreasoned or irresponsible.

Finally, I should like to suggest that Judge Bork's positions on issues of presidential power are especially revealing. In this area, where it is by no means clear what position is "liberal" and what "conservative," it is possible to avoid the strong emotions raised by such issues as abortion and affirmative action, and to obtain some new light on Judge Bork's approach to issues of constitutional interpretation.

I. In General

Three basic points emerge from Judge Bork's work on the relationship between Congress and the President.

First: In this area, Judge Bork's views do not reflect a belief in judicial restraint. Judge Bork has concluded that measures enacted by Congress are unconstitutional even when that conclusion is compelled neither by the text and history of the Constitution nor by precedent. This position contrasts quite sharply with Judge Bork's approach to questions of individual rights, where he reads the Constitution in a way that is designed to reflect deference to democratic processes.

Second: Judge Bork interprets the Constitution as establishing a powerful president. His legal position in the Watergate controversy was no aberration; it is an example of a general belief that the Constitution creates a strong presidency. Numerous areas illustrate this belief. Judge Bork's position on special prosecutor legislation, on the Watergate controversy, on the bombing of Cambodia, on judicial review of executive action, on the War Powers Resolution, on standing, on executive privilege, and on the foreign intelligence surveillance act of 1978 all confirm this point.

Third: In many areas, particularly those that involve a conflict between Congress and the President, Judge Bork takes a narrow view of congressional power. This point is reflected in the areas noted above and, to a lesser degree, in his position on congressional standing. Perhaps most striking in this regard is Judge Bork's quite narrow view of congressional power under section 5 of the fourteenth amendment, the basic constitutional safeguard of rights against state government.

None of Judge Bork's positions in this area is irresponsible. All are based on plausible interpretations of the Constitution. But the basic pattern suggests a judge whose beliefs are a source of concern for those interested in the system of checks and balances. Judge Bork's views, in this area at least, have sometimes been out of step with those of a vast majority of constitutional thinkers--conservatives, liberals, and moderates alike.

II. Particular areas

The following discussion sets forth Judge Bork's views on various issues involving the relationship between Congress and the President. The discussion consists of an outline of Judge Bork's position and of a brief discussion of where and why his position is controversial. In general, the source of my concern is this: Judge Bork has been willing to support judicial intrusions into the democratic process when there is no clear warrant for those intrusions in precedent or in the text and history of the Constitution.

The areas include Judge Bork's constitutional opposition to the special prosecutor act; to presidentially imposed limits on the presidential power of removal; to broad congressional power under section 5 of the fourteenth amendment; to congressional limitations on presidential power in the area of foreign affairs;

and to congressional standing.

1. The Special Prosecutor. The independent counsel act, originally the special prosecutor act, was enacted in 1978. Congress passed the act after a lengthy discussion of the constitutional issues. Dozens of witnesses supported the constitutionality of the act. The conference version was adopted by an overwhelming vote--in the Senate by a voice vote and in the House by a margin of 370-23.

In his testimony before Congress in 1973, Judge Bork vigorously argued that the Constitution does not permit Congress to create a special prosecutor independent of the President. See Hearings before the Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, 93d Cong., 1st Sess. 251 (1973). His basic position is that the enforcement of the laws is an executive function; that "the Constitution lodges in the executive branch complete control over criminal prosecutions" (id. at 253); and that Congress does not have the constitutional authority to separate prosecution from the presidency. Above all, his complaint was that the proposed bills would vest in the courts to power to appoint the special prosecutor. See also Hearings before the Committee on the Judiciary, United States Senate, 93d Cong., 1st Sess. 449 (1973).

In his testimony before this Committee, Judge Bork suggested that what he said "back in 1973" applied to "very different statutes than the one that is now in effect." In fact, however, the provision to which Judge Bork objected in 1973 is, in relevant part, identical to the provision now in effect. Judge Bork's principal objection was to judicial appointment of the special prosecutor. The provision for judicial appointment remains in current law, apparently on the understanding that the President should not be entrusted with appointing the person prosecuting his own high-level employees.

Judge Bork's position is surprising for several reasons. First, the plain language of the Constitution--emphasized by Judge Bork in other contexts--appears to authorize the arrangement that he believes unconstitutional. Article II, section 2 says: "[T]he Congress may by Law vest the Appointment of Such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Second, the Supreme Court interpreted Congress' power under the Appointments Clause quite broadly in the leading case, Ex Parte Siebold, 100 U.S. 371 (1879). There the Court upheld Congress's decision to allow for judicial appointment of election supervisors, even if the supervisors are executive officers. The Court said: "It is no doubt usual and proper to vest the appointment of inferior officers in that department of government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution . . . [A]s the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress." Ex Parte Siebold thus offers substantial support for the concept of a special prosecutor, and the Supreme Court has never questioned Siebold.

Third, Judge Bork's constitutional opposition to the special prosecutor act fits uneasily with any belief in judicial restraint. The concept of a special prosecutor has repeatedly been endorsed by Congress; it has passed through normal democratic channels. The idea that the act should be struck down, as unconstitutional, calls for a large measure of judicial intrusion into the lawmaking province of Congress.

Fourth, and finally, opposition to the special prosecutor act might be thought inconsistent with the basic constitutional principle of checks and balances. The point of that system is to ensure that the various branches have the power to check each other. See The Federalist No. 51. The special prosecutor mechanism promotes this function; it permits Congress to check the executive branch by ensuring that the President is not himself entrusted with the prosecution of his own appointees.

Judge Bork's responses to these arguments fall in several categories. First, he suggests that the Appointments Clause "was added with little or no debate toward the end of the

Constitutional Convention. It is impossible to believe that as an afterthought, and without discussion, the framers carelessly destroyed the principle of separation of powers that they had so painstakingly worked out in the course of their deliberations." Hearings at 254. In Judge Bork's view, the Appointments Clause authorizes courts only to appoint *judicial* functionaries; it does not permit Congress to vest in courts the power to appoint officials in the *executive* branch.

Judge Bork's position in this regard finds some support in *Ex Parte Hennen*, 38 U.S. 230 (1839), an early case on the point; but it is inconsistent with the text of the Appointments Clause, and in any event his position is squarely inconsistent with the later decision in *Ex Parte Siebold*. *Siebold* interpreted *Ex Parte Hennen* expressly contrary to Judge Bork's understanding. It may be the case that the Appointments Clause should not be read to allow Congress to vest the courts with power to appoint all inferior executive branch officials. But at a minimum, the Clause might be understood to allow the power of appointment to be vested when there is no "incongruity," *Ex Parte Siebold*, *supra*, in the judicial appointment, and when there would instead be incongruity--because of conflict of interest--in appointment by the executive branch.

Second, Judge Bork suggests that *Siebold* "is entirely a straw. . . . All that was done was to appoint some people to watch some House of Representatives' elections. I think probably it should not have been done. . . . But, even if one think ex parte Siebold was correctly decided, which I do not, I would hope that era is behind us." *Id*. at 264. This response is quite confusing. *Siebold* interpreted the Appointments Clause in accordance with its terms; and it recognized that Congress may vest the appointment of at least some executive officers in the courts. Judge Bork's position here shows a clear willingness to reject precedents with which he disagrees.

It should not be forgotten here that Judge Bork's view that the special prosecutor act is unconstitutional (a) was rejected by the vast majority of expert witnesses before Congress at the time and (b) has been rejected by every federal court that has addressed the issue to this date.

2. The Watergate affair. In the Watergate controversy, the Department of Justice, under Attorney General Elliott Richardson, promulgated a regulation assuring Special Prosecutor Archibald Cox that he could not be fired except for "extraordinary improprieties." Judge Bork apparently believed that this regulation was unconstitutional and unenforceable, and that it could not be applied to the President.

It is not altogether easy to sort out Judge Bork's constitutional views in the Watergate affair. The foundation of his position appears to be a claim that the Constitution forbids any limitation on the President's power to fire high-level executive branch employees--even if the limitation is imposed by the executive branch of its own free will. Hence Judge Bork helped the President write an amendment to the charter governing Special Prosecutor Leon Jaworski, saying, in pertinent part, "[T]here is no expectation whatever that the President will ever have an occasion to exercise his constitutional right to discharge the Special Prosecutor." Hearings before the Committee on the Judiciary, United States Senate, 1st Sess. 85 (1973) (emphasis added). See also id. at 89, suggesting Judge Bork's view that the President does have such presidential power, as a matter of inherent constitutional authority.

Apparently this understanding undergirded Judge Bork's decision to discharge Archibald Cox. It will be recalled that that decision was unlawful under a Department of Justice regulation that allowed discharge of the special prosecutor only for "extraordinary improprieties." Thus there can be no doubt that Judge Bork's decision to fire Archibald Cox was illegal under a validly adopted regulation. The legality of his decision, for Judge Bork, must have depended on his view, raised by him in at least one lawsuit, that the regulation was an unconstitutional restriction of presidential power.

In hearings before this Committee, Judge Bork suggested that in his view, the protection of the special prosecutor ran against the Attorney General alone, and was not intended to bar the President from discharging Archibald Cox. This response is confusing for two reasons. First, it was the Attorney General--at the time, Judge Bork himself--who discharged Cox. Second, the regulatory protection would serve no function if it did not bind the President, for it was the President who was under investigation.

The issue of presidential power here is somewhat different from that raised by the special prosecutor act. Here the question is whether the Constitution will permit enforcement, as against the President, of an executive branch directive that, of the executive branch's own accord, limits presidential power. By contrast, the question raised by the special prosecutor act has to do with Congress' power to restrict presidential authority to appoint, supervise, and remove an inferior officer. Judge Bork believes that both measures are unconstitutional, but it would be possible to distinguish the two cases.

United States v. Nixon, 418 U.S. 683 (1974), decided by a unanimous Supreme Court, squarely rejects Judge Bork's position on the Watergate issue. In Nixon, the Court referred with approval to the limitations on the removal power and said that those limitations were lawful. The Court wrote that so "long as this regulation is extant it has the force of law." Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973), is to the same effect. The court there said that Judge Bork's "firing of Archibald Cox in the absence of a finding of extraordinary impropriety was in clear violation of an existing Justice Department regulation having the force of law and was therefore illegal." Id. at 108. (The decision was later vacated as moot, but in light of United States v. Nixon, there should be no serious question about whether it was rightly decided.)

Judge Bork's apparent view--that the President may not voluntarily limit his plenary power to discharge high-level officials--is somewhat surprising. A long line of cases, relied on in both United States v. Nixon and Nixon v. Bork, recognizes that validly adopted regulations of the executive branch are binding on the executive branch, including the President. Of course the President is under no obligation to adopt such regulations in the first instance. But once they are adopted, they are mandatory. Judge Bork's position to the contrary can find little support in the decided cases.

3. Congressional power to enforce the fourteenth amendment. The fourteenth amendment contains the equal protection clause and the due process clause; it is also the route through which the bill of rights is applicable to the states. It is one thing to suggest that the Court itself--because of its undemocratic character--should construe the fourteenth amendment relatively narrowly. (Judge Bork, and many others, have so argued.) It is quite another thing to suggest that the power of Congress--the representative of the people--to enforce the fourteenth amendment should likewise be sharply limited.

It is Judge Bork's endorsement of this second proposition that is of particular interest. Judge Bork has taken an extremely narrow view of the power of Congress under section five of the fourteenth amendment. Indeed, his view is probably the most narrow possible. Although his position in this regard does not bear on the question of presidential power, it is directly relevant to his views of congressional authority and of checks and balances.

Consider, for example, Congress' deliberations about whether to enact S. 158, the "human life bill," which would (a) deem human life to exist from the point of conception and (b) remove from the lower federal courts jurisdiction over abortion cases.

Some background is necessary in order to understand Judge Bork's position on this matter. Section 5 of the fourteenth amendment allows Congress to "enforce" the fourteenth amendment "by appropriate legislation." There is little doubt that the framers of the fourteenth amendment intended Congress to be the principal enforcer of the newly recognized rights. And in a series of cases, the Supreme Court has held that section 5 allows Congress to invalidate practices that the Court, interpreting the fourteenth amendment on its own, would uphold. Thus in Katzenbach v. Morgan, 384 U.S. 641 (1966), the Court held that Congress might invalidate literacy tests on the ground that they were racially discriminatory, even though the Court had itself, in Lassiter v. Northampton Election Board, 360 U.S. 45 (1959), upheld literacy tests. In Oregon v. Mitchell, 400 U.S. 112 (1970), the Court held that Congress could eliminate all literacy tests. Other cases reflect the same understanding of Congress' power. See South Carolina v. Katzenbach, 383 U.S. 301 (1966); City of Rome v. United States, 446 U.S. 55 (1980).

The exact reach of Congress' power under section 5 has not been clearly decided. A relatively narrow reading would suggest that Congress has the power to adopt general rules, or to use its own factfinding competence, to eliminate practices that the Court would deem unconstitutional. In this view, a ban on literacy tests could be justified on the ground that at least some such tests were adopted in order to discriminate against blacks. Under a broader reading, Congress has the power to decide what is a substantive violation of the fourteenth amendment. Under this view, Congress could decide that literacy tests were unconstitutional because of their discriminatory effects, even if there was no discriminatory motive. Katzenbach v. Morgan offers some support for both readings.

In Katzenbach v. Morgan, however, the Court made it clear that congressional power under section 5 does not extend to the "dilution" of established constitutional rights. And it was on this ground that there was general agreement among experts in constitutional law that the Human Life Bill was unconstitutional. Even if Roe v. Wade was not rightly decided -- of course a disputed question -- it does recognize a woman's right to have an abortion, and so long as Roe is the law, Congress may not, under Katzenbach, infringe on that right.

Judge Bork's views on the matter are based on a quite different line of analysis. In his view, Congress' power is extremely narrow, including "the power to provide criminal penalties, redress in civil damage suits, and the like, for those violations of those constitutional guarantees as they are defined by the courts." See Hearings before the Subcommittee on Separation of Powers, Committee on the Judiciary, United States Senate, 97th Cong., 1st Sess. 310 (1982). Thus Katzenbach, Oregon v. Mitchell, and related cases, in Judge Bork's view, "represent[] very bad, indeed pernicious, constitutional law." This view, if accepted, would of course call for a dramatic change in constitutional doctrine. (It is noteworthy as well that in these hearings, Judge Bork said that "nobody believes that the Constitution allows, much less demands, the decision in Roe v. Wade or in dozens of other cases of recent years." Id. at 315 (emphasis added). Roe is of course a disputed decision, and many people believe that it was wrongly decided; but the idea that "nobody" believes that it or "dozens" of other decisions are even "allowed" by the Constitution is striking, and demonstrably false.)

Judge Bork's narrow view of congressional power under section 5 of the fourteenth amendment, while defensible, is also not widely shared and indeed is probably wrong. It would also make an enormous difference in the law. As noted above, a modest alternative position--one that would greatly increase legislative authority--would suggest that at a minimum, Congress has the power to enact prophylactic rules to forbid practices that would (in the Court's view) violate the Constitution.

Under that theory, the legislation at issue in Katzenbach and Mitchell is unobjectionable. Congress could decide that literacy tests for voting were often unconstitutionally motivated and that a general prohibition on such tests is the most effective means of preventing unconstitutionality. A broader view would suggest that Congress itself has power to interpret the Constitution, and that it may disagree with a judicial decision--at least if Congress is being more protective of constitutional rights than the Court. Katzenbach supports this view as well. But even if the broadest view should be rejected, Judge Bork's quite narrow reading of congressional power is surprising, and it would have severe consequences for efforts by both conservative and liberal congresses to protect individual rights.

4. Foreign affairs. There is evidence as well that Judge Bork takes a narrow view of congressional power in the area of foreign affairs, and a correspondingly broad view of presidential authority. (a) The bombing of Cambodia. Some intimations of Judge Bork's view on the role of the President in foreign affairs are given by his remarks on the bombing of Cambodia in 65 American Journal of International Law 79 (1971). According to Judge Bork: "There is no reason to doubt that President Nixon had ample Constitutional authority to order the attack upon the sanctuaries in Cambodia seized by North Vietnamese and Viet Cong forces. The authority arises both from the inherent powers of the President and from Congressional authorization." He continued to suggest that "[a]ny detailed intervention by Congress in the conduct of the Vietnamese conflict constitutes a trespass upon powers the Constitution reposes exclusively in the President." He added: "It is completely clear that the President has complete and exclusive power to order tactical moves in an existing conflict," and that "it is perfectly clear that a President may conduct armed hostilities without a formal declaration of war by Congress and that Congress may authorize such action without such a declaration."

These views suggest a willingness to construe presidential power quite broadly, but standing by themselves, they are far from indefensible, at least insofar as they suggest that the bombing of Cambodia was lawful. The most controversial aspect of Judge Bork's statements here is his claim, not merely that the President had constitutional authority to bomb Cambodia, but also that Congress has no power to control the Cambodia incursion. Under the Constitution, of course, Congress has the power to declare war; the President's authority in foreign affairs is hardly plenary.

A plausible position, contrary to that of Judge Bork, is that Congress has the constitutional power to decide the extent of any war. At the very least, Congress probably has the power to limit a war to a particular country. Judge Bork's view appears to be that once a war has been authorized, the President has the inherent constitutional power to extend its reach if necessary, even though that judgment is inconsistent with the congressional declaration. In some circumstances, Judge Bork's position is probably correct; tactical judgments may enable the President to extend a war into other nations. But his broad and unqualified statements are somewhat disturbing.

(b) Foreign Surveillance. Expansive views on presidential power are reflected in Judge Bork's testimony on the foreign intelligence bill of 1978. See Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 95th Cong., 2d Sess. 130 (1978). The proposed statute was supported by the Department of Justice and the intelligence community itself. The bill authorizes the use of electronic surveillance of American citizens in the United States, and provides for such surveillance through a procedure of court approval for most targets or Attorney General approval for surveillance that would not involve communications with American citizens. According to the Attorney General, the measure would "strike[] a proper balance between the vital interests at stake." Id. at p. 3. The act was passed in the Senate by a vote of 95-1; the House approved it by a vote of 246-128.

Judge Bork, on the other hand, contended that the bill was "thoroughly a bad idea" and "almost certainly unconstitutional as well." Id. at 130. In his view, the requirement of a request for court approval "would almost certainly increase unauthorized and damaging disclosures of sensitive information." Id. at 132.

The most striking aspect of Judge Bork's testimony is his suggestion that the bill would violate Articles II and III of the Constitution. With respect to Article II, Judge Bork claims that "Congress' constitutional role is largely confined to the major issues. . . . Congress . . . may not dictate the President's tactics in an area where he legitimately leads." Id. For Judge Bork, the proposed bill violates this principle by "prescribing numerous details of the conduct of foreign intelligence surveillance, imposing the warrant requirement . . . and forcing upon the President the wholly inapposite requirement that a federal criminal law be about to be violated before he may defend the nation's interests." Id. With respect to Article III, Judge Bork contends that there is no constitutional case or controversy and that the use of Article III judges is therefore unconstitutional. (This view does not bear on the question of presidential power and will therefore not be discussed here.)

Judge Bork's reading of Article II here is extremely adventurous and indeed quite curious. It is true, as Judge Bork suggests, that the President has discretionary power, under the Commander-in-Chief clause, to make tactical decisions during war. But to say this is not to suggest that Congress is without power to impose limitations on surveillance. Whether the President has the power to engage in surveillance without congressional authorization is itself a disputed and difficult question. But the key point here is that under the necessary and proper clause, limitations by Congress appear to fall plainly within legislative power. The President has no "inherent" authority, in the face of a congressional judgment to the contrary, to engage in surveillance activities. In some respects, Judge Bork's position here is his most idiosyncratic of all those discussed in this memorandum--and the view in greatest tension with judicial restraint and respect for precedent.

In defending his position before this Committee, Judge Bork invoked lower court decisions suggesting that the President has the power to engage in surveillance if Congress has not acted. But that is not the issue here, which is whether the President has such power if and when Congress has limited surveillance. No case supports Judge Bork's conclusion that he does have that power.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), suggests that Congress has considerable power to limit presidential action domestically, even if that action is undertaken during time of war and in an effort to promote foreign affairs. In his testimony, Judge Bork did not even refer to

Youngstown, which appears to argue powerfully against his position. And even if Youngstown can be distinguished, there is little support in the text or history of the Constitution, or in the decided cases, for Judge Bork's claim. (Compare the circumspect opinion by Justice Powell for the Supreme Court in United States v. United States District Court, 407 U.S. 297 (1972), in which the Court held that the fourth amendment requires judicial approval for domestic security surveillance.)

(d) Abourezk v. Reagan, 785 F.2d 1043, 1063 (D.C. Cir. 1986), involved a suit brought by American citizens challenging the failure of the Secretary of State to issue visas to aliens invited to speak on issues of public concern. Judge Bork, citing the need for deference to the executive in the area of foreign relations, dissented from the panel decision, which remanded the decision to the State Department for further explanation. Judge Bork rejected statutory and constitutional challenges to the decision, largely because of what he perceived as a need for deference to the executive.

(d) In 1978, Judge Bork stated: "As expiation for Vietnam, we have the War Powers resolution, an attempt by Congress to share in detail decisions about the deployment of U.S. armed forces in the world. It is probably unconstitutional and certainly unworkable." Wall Street Journal, March 9, 1978.

The reasons for this conclusion are not spelled out, and his explanation before this Committee is somewhat obscure. In his remarks, Judge Bork initially suggested that the consulation and notice requirements "seem co[illegible]titutional." He emphasized that the Resolution 'contains a legislative veto" and that the Supreme Court has held that legislative vetoes are unconstitutional. Later he suggested that "on the part about controlling the introduction of troops, or withdrawal of troops, and so forth. . . . that could be Constitutional in some cases and possibly unconstitutional in others.' In his view, the act would raise a constitutional problem "if it leads to micro-management of tactical decisions in a conflict," and "that is all I meant in this brief one sentence . . . ."

In context, Judge Bork's remark in the Wall Street Journal and his later explanation in testimony suggest that he believes that the War Powers Resolution might lead to unconstitutional interference with the President's warmaking powers. This conclusion should be understood against the background of the bipartisan support for the Resolution in the Congress--284-135 in the House, 75-18 in the Senate--and the fact that numerous scholars had testified in favor of the constitutionality of the bill.

The constitutional issue is not a simple one, and Judge Bork is correct in pointing to the President's power to make tactical decisions during a war. The Constitution does, however, vest in the Congress the power "to declare war," and there is little in the history of the Constitution or the intent of its framers to forbid congressional controls of the sort involved in the War Powers Resolution. The Resolution does not in fact lead to "micro-management." Its purpose and effect are to ensure that Congress, rather than the President, decides whether the nation is to be at war.

5. Congressional standing. Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985), involved a suit by thirty-three individual members of the House of Representatives, joined by the Senate and the Speaker and bipartisan leadership of the House. The plaintiffs sought a declaratory judgment to nullify President Reagan's attempted pocket veto of certain legislation. A major question in the case was whether the plaintiffs, as members of Congress, had "standing" to seek judicial review of the President's action.

In Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), the court had held that a United States Senator had standing to challenge an unconstitutional pocket veto on the ground that it had nullified his original vote in favor of the legislation at issue. The court reasoned that the unconstitutional exercise of the pocket veto power directly interferes with the right of members of Congress to participate in the lawmaking process. The court said that in the context of (a) a constitutional impasse, (b) a dispute over an issue of law, and (c) a case involving a direct personal stake of a member of Congress, standing would be available. In Barnes, the court applied this precedent.

Judge Bork dissented. In his lengthy and far-ranging opinion, he suggested that we "ought to renounce outright the whole notion of congressional standing." Id. at 41. In his view, the members of Congress were "suing not because of any personal injury done them but solely to have the courts define and protect their governmental powers." Id. at 42. Judge Bork attempted to connect this concern with his general belief in a restricted judicial role and in sharp limitations on "standing" to seek review of executive action. "Every time a court expands the definition of standing, the definitions of the interests it is willing to protect through adjudication, the area of judicial dominance grows and the area of democratic rule contracts." Id. at 44 (emphasis added).

This last statement is especially odd in light of the fact that standing was accorded in Barnes and similar cases precisely in order to increase "the area of democratic rule." When an unconstitutional pocket veto is permitted, and is not challenged, a law enacted by the democratic process is not enforced. Limitations on standing, in such cases, thus work against democratic institutions, not in favor of them.

Judge Bork's central concern in Barnes seemed to be that members of Congress should use other avenues than the courts if they seek to challenge presidential behavior. "Members of Congress, dissatisfied with the President's performance, need no longer proceed, as historically they always have, by oversight hearings, budget restrictions, political struggle, appeals to the electorate, and the like, but may simply come to the district court down the hill from the Capitol and obtain a ruling from a federal judge." Id. at 45. Judge Bork added: "When federal courts approach the brink of 'general supervision of the operations of government,' as they do here, the eventual outcome may be even more calamitous than the loss of judicial protection of our liberties." Id. at 71 (emphasis added). See also Vander Jagt v. O'Neill, 699 F.2d 1166, 1177 (D.C. Cir. 1983) (Bork, J., dissenting).

The subject of congressional standing is a difficult one, and reasonable people certainly differ; but it is not easy to understand why Judge Bork is so exercised by it. Three observations are appropriate here. (a) One major error in his opinion is the suggestion that the question in *Barnes v. Kline* was a political rather than a legal one. The question depended centrally on the meaning of the Constitution. The complaint was one of law rather than of policy. Courts were not on the "brink of general supervision of the operations of government." They were deciding a strictly legal question.

(b) The setting of *Barnes* was specialized and narrow. In the *Barnes* case, members of Congress were not arguing that they could bring suit whenever the President has failed to enforce the law, or undertaken action of which they disapprove. The action involved the unusual context of a pocket veto. In that context, recognition of a congressional cause of action does not obviously disturb the basic constitutional structure. Indeed, such an action would be a crisper and more refined method of dealing with the problem than (for example) a congressional cut-off of appropriations.

(c) The notion that recognition of congressional standing, and related matters, could seem to Judge Bork to be possibly "more calamitous than the loss of judicial protection of our liberties" should not go unremarked. It is a most unusual statement, suggesting a distinctive understanding of what is paramount to the constitutional plan.

(d) There is a close connection--apparently overlooked by Judge Bork--between limitations on standing and the division of authority between the President and the Congress. If standing is denied, statutes enacted by Congress can be ignored by the executive branch. In statutory cases, it is cases that allow standing that increase democratic control, by vindicating laws enacted by Congress against the executive branch.

7. *Executive privilege*. In a brief dissenting opinion,

Judge Bork suggested an expansive view of executive privilege. Wolfe v. Department of HHS, 815 F.2d 1527 (D.C. Cir. 1987), involved a suit brought under the Freedom of Information Act seeking access to a regulations log of HHS concerning proposed FDA regulations. The court held that the information within the log was not protected by the "deliberative process" exception to the FOIA, and that executive privilege did not bar disclosure.

Judge Bork dissented, principally on the statutory issue; but he spoke to the constitutional question as well. Although he phrased his views tentatively on this point, his opinion takes executive privilege as far as, and probably further than, any judge who has yet addressed the issue. Judge Bork suggested, without ruling definitively, that an effort by Congress to require disclosure of these logs would invade the constitutional power of the President. For Judge Bork, executive privilege protects communications to which the President is not a party. Id. at 1539-1540. Any delegation from the President "to be effective should carry with it the delegation of the President's constitutional privilege." Id. at 1539.

While the issue is one on which reasonable people may differ, no Supreme Court opinion extends executive privilege so far. A plausible alternative position would limit the privilege to communications involving the President himself, or at least to high-level policy determinations involving presidential decisions.

B. Access to the courts: review of administrative action. Additional evidence about Judge Bork's views on presidential power is provided by his votes in cases involving challenges to federal administrative action. The record suggests that in cases brought by beneficiaries of regulatory programs, as well as in those brought by members of Congress, Judge Bork is sometimes reluctant even to allow the plaintiffs into court. See, e.g., Center for Auto Safety v. Thomas, 806 F.2d 1071 (D.C. Cir. 1986). In Center for Auto Safety, several organizations brought suit against the EPA, challenging a rule that adjusted, and applied retroactively, some of EPA's previous fuel economy ratings. The plaintiff-organizations included various members who argued that the retroactive adjustment would impair their ability to have the widest possible choice of fuel-efficent vehicles. In the plaintiffs' view, the EPA's decision would remove substantial financial incentives to produce fuel-efficient vehicles in the future. Judge Bork concurred in the court's decision, which both recognized standing and invalidated the EPA rule, but said that he did so "only because we are bound on the issue of standing by the prior panel opinion." Id. at 1080.

Judge Bork's doubts about standing here appear to depend on a view that while regulated industries almost always have "standing" to sue, the beneficiaries of regulation--environmental organizations, consumer groups, civil rights organizations--often should not be understood to have a "legal interest" at stake. Their remedy--unlike that of regulated industries--should lie in the political process, not the courts.

The consequence of such a principle would be to immunize executive decisions--even unlawful ones--from challenge. That result would create an unfortunate bias in judicial review: a judicial challenge to regulatory intervention would be available, but executive branch officials would be aware that failure to implement directives set out by Congress would not be subject to judicial correction. And Judge Bork's view is not a tribute to judicial restraint in the abstract; it is only a selective application of the principle of restraint.

Similar understandings are reflected in Judge Bork's record with respect to challenges to executive action. In this extremely important area, Judge Bork's belief in executive power may sometimes tend to defeat laws enacted by Congress, as executive officials who have failed to implement statutory directives are permitted to escape legal control.

III. Conclusion

Judge Bork's views in the area of relations between Congress and the President do not reflect a strong belief in judicial restraint. Moreover, they show some willingness to depart from precedent. His views here appear to depend not primarily on constitutional text and history, but instead on a set of beliefs drawn from his reading of the constitutional structure.

Those beliefs include a relatively broad understanding of presidential power; a relatively narrow reading of congressional authority in cases involving conflicts between presidential and congressional authority; an occasional willingness to protect executive officials against judicial review, especially in suits brought by Congress and beneficiaries of regulatory programs enacted by Congress; a reluctance, in some areas of foreign affairs and domestic relations, to permit Congress to place limitations on presidential power; and a significant degree of judicial "activism," in the form of a willingness to strike down legislation that has been enacted democratically.

These beliefs are distinctive -- in a few cases, idiosyncratic. Judge Bork's positions, here as elsewhere, are reasoned, plausible, and well-defended; but they should be a source of concern to conservatives, liberals, and moderates interested in the constitutional system of checks and balances.

The CHAIRMAN. Thank you both very much.

I hope the rest of the witnesses today follow your lead, and my colleagues, in being as thoughtful, concise, and within the time.

Let me start with my 5 minutes, since we have set it for 5 minutes, with you, Tom, Senator Eagleton.

We have been told by many here that Judge Bork is a majoritarian; that his Madisonian view of the Constitution is that—and we have heard it repeated time and again—that he really thinks that unless the Constitution explicitly delineates a right or a protection, that the Court should always give deference to the majority view as expressed, because he has more faith in 535 Members of Congress than nine men and women sitting on the Court, and the list goes on.

Do you view Judge Bork's attitude toward war powers, foreign intelligence surveillance, special prosecutor, the general question of standing for Congress, as consistent with what is otherwise a majoritarian view of the Constitution?

Senator EAGLETON. Self-evidently, it would be inconsistent with such a so-called majoritarian view. Insofar as I can tell, no one else in the country takes the absolutist Bork position on the Foreign Intelligence Surveillance Act. And as Professor Sunstein points out, each one of his positions might be defensible, each one of his positions might be intellectually arguable. But when you add them all up together, then there is the destruct pattern to which he referred. When there is a contest, competition between the President and the Congress, the President always wins, the omnipotent President always wins. And that is how Judge Bork views it, time and again.

The CHAIRMAN. Professor, Judge Bork in two cases as a sitting judge, in *Vander Jagt* v. *O'Neill* in 1983, and in *Barnes* v. *Kline* in 1985, used awfully strong language. In one case, he said that recognition of congressional standing might "be more calamitous than the loss of judicial protection of our liberties." Let me read that again. He said recognition of congressional standing might be "more calamitous than the loss of judicial protection of our liberties." And in another case, he used equally as strong language denouncing congressional standing.

Can you tell me whether or not there is any case that you are aware of where Judge Bork has indicated that there should be congressional standing? And there must be someplace that he has sided with the—I think there is—well, is there any place that he has sided with the legislative branch against the executive?

Mr. SUNSTEIN. On the first question, I think in one of his very first decisions on the court, he joined a decision recognizing congressional standing. He later concluded that his original decision in that respect was a mistake, and his view now is crystal clear, which is that we ought to abolish outright the whole notion of congressional standing.

On that issue, Judge Bork's view distinguishes him from many conservative judges, including Judge Raub and Judge Wilkie on the Washington court, who have recognized congressional standing.

The CHAIRMAN. Translate this into everyday terms. When Judge Bork says that the Congress and Members of the Congress have no standing to challenge a President's action, what does that mean?

Mr. SUNSTEIN. What that means in practice is that there is no legal avenue; there is no way to get the court to require the President to obey the law as enacted by Congress. At least, there is no way Members of Congress can go to court.

Now, in the context of the pocket veto, what that means is the President wins.

The CHAIRMAN. What does "pocket veto" mean?

Mr. SUNSTEIN. "Pocket veto" means if the President fails to return a law and veto it, it ordinarily becomes law, except if Congress adjourns within 10 days, and the President fails to return it, then the law expires. Now, the pocket veto is when Congress has not been available—it has adjourned—or the President to return it; the President has effectively let it expire.

Now, the pocket veto becomes controversial in cases where Congress has appointed an agent who is available to receive the veto, and the President has not done anything. If Congress has appointed an agent, and the President has not done anything, then the law should become a law. If Congress cannot bring suit to make it be a law, then there is no way for Congress to get the law on the books. The President can simply ignore it.

Keep in mind the practical consequences of the denial of congressional standing. They are very broad. Justice Powell suggested that in some cases of constitutional impasse, there ought to be congressional standing. A flat prohibition on congressional standing means that Members of Congress could never go to court to get the President to obey the law. That is a very dramatic position.

The CHAIRMAN. My time is up. I thank you for your answers.

I yield to the ranking member, Senator Thurmond.

Senator THURMOND. We are glad to have you gentlemen here. Professor Sunstein, did you teach under Dean Levi?

Mr. SUNSTEIN. Dean Levi was not the dean while I was there. He is still at the University of Chicago, and I perceive myself, in many respects, still under him. I have a lot of admiration for Dean Levi.

Senator THURMOND. You have great respect for him, do you?

Mr. SUNSTEIN. Enormous respect for him.

Senator THURMOND. Now, he came and testified on behalf of Judge Bork, and his testimony—I do not know whether you have had a chance to read it or not—but it is a strong endorsement of Judge Bork.

He feels that Judge Bork possesses the integrity, the judicial temperament, and the professional competence to be a good Supreme Court judge. But you disagree with him?

Mr. SUNSTEIN. If you use integrity and professional competence, I do not think it would be possible to have concerns about Judge Bork on those scores. He is a first-rate lawyer. I prefer to deal with specifics, and on questions of presidential power, there have in fact been strong disagreements between Judge Bork and Attorney General Levi.

The Foreign Intelligence Surveillance Act Attorney General Levi supported, vehemently. Judge Bork, uniquely, said that it was unconstitutional.

Senator THURMOND. Did you hear the testimony of Chief Justice Burger?

Mr. SUNSTEIN. I heard a little bit of Chief Justice Burger's testimony, Senator.

Senator THURMOND. Chief Justice Burger is now retired. He has no interest in this matter, and he came here, voluntarily. Now Chief Justice Burger says some people have accused Judge Bork of being an extremist.

He says, "If he's an extremist, I'm an extremist, and he thinks like I do."

Judge Bork handed down 150 decisions while on the circuit court, and he has participated in 400 decisions, or more, and none of those decisions have been reversed by the Supreme Court, and Chief Justice Burger feels that he is in line with the Court, his thinking is in line with the Court.

Do you know Chief Justice Burger?

Mr. SUNSTEIN. I have met him. I clerked——

Senator THURMOND. And you have respect for him?

Mr. SUNSTEIN. Yes, I do, Senator.

Senator THURMOND. And you heard his strong endorsement of Judge Bork?

Mr. SUNSTEIN. I heard a piece of it on McNeil/Lehrer.

Senator THURMOND. So you disagree with the dean of your law school—Dean Levi—and disagree with former Chief Justice Burger?

Mr. SUNSTEIN. Well, as I say, Senator, I would like to speak to specifics and not generalities. Now lower-court performance is really an inaccurate predictor of Supreme Court performance. If you look at the Chief Justice's own record on the lower court, you will not find a very good prediction of Chief Justice Burger's performance on the Supreme Court. So, too, for Justice O'Connor, so for Justice Stevens, so for Justice Blackmun, all of whom have departed a great deal from their performance as lower-court judges.

Now I also want to say—the word "extremist" one wants to be very careful about—but in the area of executive power, the constitutional opposition to the War Powers Resolution, the constitutional opposition to the Special Prosecutor Act, in those cases Judge Bork went in the face of an overwhelming consensus in the other direction. So, too, on standing; so, too, in other areas.

I regret to say that in these areas, Senator, Judge Bork's positions are not moderate.

Senator THURMOND. That is your opinion, and you have given it. Did you hear the testimony of the presidents of the American Bar Association? We had three here the other night, at one time. They all know Judge Bork and have respect for him.

Did you hear that testimony?

Mr. SUNSTEIN. I heard pieces of it.

Senator THURMOND. They all endorsed him highly. They said he is in the mainstream and he would make a great Supreme Court Justice.

That is all. Thank you very much.

Mr. SUNSTEIN. Do you want me to comment on that, or——

The CHAIRMAN. Yes. Please do.

Mr. SUNSTEIN. Okay. The American Bar Association, I understand for the first time in a long time—maybe the first time ever—was badly split on this issue. That is my understanding. And Judge

Bork's views have provoked a kind of split in the legal community which is extremely unusual.

Senator Thurmond, let me add: I think this is an issue on which people of good faith can disagree, and I do not think the issue can be decided by marshaling lists of people opposed and in favor.

The CHAIRMAN. Senator Eagleton, we are glad to have you here. I have no questions of you. Thank you very much.

Senator EAGLETON. Thank you, Senator Thurmond. Good to see you, sir.

The CHAIRMAN. Would you like to make any comments, Senator?

Senator EAGLETON. No.

The CHAIRMAN. Did you hear the testimony of the two former presidents of the ABA who also opposed him?

Mr. SUNSTEIN. McNeil/Lehrer gave me excerpts from that as well, Senator.

The CHAIRMAN. I yield to Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

I know we are short on time. I cannot resist the opportunity to welcome back to the Senate our former colleague, Senator Eagleton. I think that as we listened to his testimony, it is useful and relevant to recognize, that he was a former district attorney, the youngest one in the history of Missouri, and a former attorney general in Missouri, the youngest one elected to that position, I think nationwide. And for 18 years he served in the U.S. Senate. He was one of the prime sponsors of the War Powers Act, he served on the Intelligence Committee, and therefore, when he speaks about the War Powers Act, and when he talks about the Foreign Surveillance Intelligence Act he brings a demonstrated background. Those of us preparing for the hearings today have to take note of the writings that he has made on these issues.

It is a subject he has thought about deeply, and I think we have certainly been enriched by his own testimony.

Professor Sunstein has appeared before the Judiciary Committee on separation-of-powers issues three different times, under Republican and Democratic chairmanship. I must say, Professor, usually you are testifying in favor of greater power and authority located in the Executive.

I think the panel understands that we have been dealing with first amendment issues, we have been dealing with equal-protection questions, we have been dealing with civil-rights issues, and we have been dealing with privacy issues.

We also have talked about the relationship between the Executive and the Congress, and it is on this issue that your testimony is extremely important.

And in that relationship between the Executive and the Congress, it seems that you have identified about four or five major areas. The War Powers Act. We are talking about congressional standing; we are talking about the foreign-surveillance—legislation that was passed overwhelmingly, with only I believe a handful of dissenters; and we are talking about the pocket veto; and about the Special Prosecutor.

And on each of those basic questions which have come up about the relationship between the Congress and the Executive. You have each stated, that on all five of those questions, that Judge Bork comes out, unequivocally, in favor of presidential power.

I would like to ask a specific question on the role of standing.

Say the Congress passed a bill that prohibited arms sales to Iran, or say we took some action that prohibited the Executive, by taking certain actions in Central America, to make arms sales to Iran. If we passed that, and the President perhaps would veto it, but we still overrode the veto, in terms of majority rule by the people's representatives.

And then the President went ahead and sold those arms to Iran in opposition to what was the stated law. If the members, under Judge Bork's opinion, if the members did not have standing, who would be able to bring the case against an executive who apparently would violate the law? Since the Judge's understanding is that the only person that would have standing would be injured persons.

We are not talking about Social Security here, although the Judge did find adversely against our senior citizens in the one Social Security case that he took.

When we are talking about the issues such as a prohibition of arms sales, or prohibition of certain other kinds of activities in Central America—if the Members of Congress do not have standing, who would?

And if we do not, what is the implication in terms of the relationship between the Executive and the Congress?

Professor SUNSTEIN. I gather that Judge Bork's view is that no one would have standing, and you might think there—that is actually a hypothetical case, but there is a real-world one, which is *Goldwater* v. *Carter,* when Senator Goldwater sued the President on the abrogation of the treaty with Taiwan.

Senator KENNEDY. Taiwan treaty.

Mr. SUNSTEIN. No one would have standing.

Now what Judge Bork says is that these are, quote, "essentially political questions," unquote, that ought not to be resolved in court.

But they are not essentially political questions. The question is a legal one, under statute or the Constitution.

Alexander Hamilton, in The Federalist Papers, wrote that to suppose that these are essentially political questions is a mistake. This is to suppose that the will of the Constitution, or the law, is superior to the will of the elected representatives. That has always been the tradition.

Senator KENNEDY. Could I hear from maybe Senator Eagleton just on that particular issue.

The CHAIRMAN. Senator Eagleton, would you speak to that.

Senator EAGLETON. I think the professor is correct, and it would leave the Congress with only one alternative, the most awesome alternative of all, to trigger the impeachment process.

Can you imagine, if that is the only remedy Congress has, when it believes that a law that it has passed, has been violated by the President and the courts will not hear the Congress in terms of standing, the only remedy then Congress has is to commence in the House of Representatives an impeachment trial? That would put us in an incredible situation.

Senator KENNEDY. I thank you both.

The CHAIRMAN. Thank you very much. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman. I join my colleagues, Senator Eagleton, in welcoming you back. I would rather have you on this side of the table than on that side, but it is nice to have you at the table.

Senator EAGLETON. Thank you very much.

Senator SPECTER. In light of the 5-minute rule, I have two questions and I am going to ask them both at the start.

They are separate questions on separate subjects. The first question is to you, Senator Eagleton.

I share your concern about the issue of standing, and about the issue of the War Powers Act, and I discussed that, extensively, with Judge Bork when he was here.

Now his response on the issue of standing was that not only did he think that Congress should have no standing, but he thought the President should have no standing either, if a controversy arose.

Not that that is necessarily meaningful, because it is harder to structure a case where the President sues than where the Congress sues.

But he did raise one consideration which I thought had significant merit, and that was the regular political forces to resolve the controversy. Now you have testified that the sole remedy is impeachment, and I question that because we have the power of the purse and can stop the appropriations process.

When you consider litigation, it is very hard to bring it to a conclusion. There has been litigation started on the War Powers Act over the Persian Gulf, but it is still in the district court.

There is the problem of case in controversy. It is mooted out.

Now, the question I have for you, Senator Eagleton—and you have been in the Congress a long while and know these matters intimately. Is it realistic for the Congress to withhold funding of military actions? And I frankly think it is highly doubtful that we can do that.

But is it conceivable, that if we, exercising our congressional power, stop funding in the Persian Gulf, that the next time the President might respect the War Powers Act? That is question one.

Question two is entirely different, and it goes to a line which comes from Professor Sunstein's written testimony, saying that it is difficult to predict the behavior of a newly appointed Justice of the Supreme Court, and this question is for you, Professor Sunstein, and it is this.

We know that we have been surprised in the past by what Justices have done—Chief Justice Warren, Justice Black, Justice Tom Clark repudiated Truman on the seizure of the steel mills, and so forth.

The evidence which has been presented so far, albeit it limited, is that Judge Bork enjoys collegiality. He has testified that the relationships are good on the D.C. Court of Appeals.

We have not heard from any of his colleagues on that issue, and there has been something in the press, which might suggest something to the contrary, but, on the record we have now, Judge Bork is a man who understands judicial collegiality. As one member of the Court, he has to understand that he can have sway only if there is some sort of a consensus that he can be a party to, and that he cannot be an extremist and have any likelihood of having his views felt on the Court, cannot say protection does not apply to women, or cannot say clear-and-present danger is outside the pale, et cetera.

My question to you is, in light of your statement and recognition of the difficulty of predicting the behavior of newly appointed Justices to the Supreme Court, isn't there a good reason to expect that if Judge Bork were on the Supreme Court, that Justice Stevens' expectation would be correct, that he would fit in? That what little we have from Justice White would be correct, that he would fit in?

Senator Eagleton, would you start with question one.

Senator EAGLETON. I think, Senator Specter, that you are prudent in pointing out the funding remedy the Congress has.

In the Vietnam context, it took 7 years of attempted funding cutoffs to finally constrain the expansion and continuation of that war.

Now, let's translate it to the Persian Gulf. Suppose that the Congress passed a resolution in a rider to a bill: "No American ground forces shall be dispatched to the Persian Gulf without the permission of Congress."

And suppose the President signed the bill because it was attached to an omnibus bill. The President then said, "To heck with it, I am going to dispatch ground forces". I submit that there is a huge difference between trying to remedy something after the fact and something before the fact.

That is, it is too late, after the forces have been sent. Once the flag is committed, as Senator Russell once told me in my early days in the Senate here—once that flag is committed—you more or less have to stick with the decision, or you are not red, white and blue. Senator Russell had very serious misgivings about the wisdom of the Vietnam War, but he would not do anything to constrain presidential power because the flag has been committed, the decision had been made, the troops had been sent.

So the funding remedy is important. Funding cutoffs can be useful, but they are not the perfect remedy, if a President sees fit, on his own, to ignore a congressional restraint.

Mr. SUNSTEIN. I have no doubt that Judge Bork would fit in and be collegial. There is every reason to believe he would. On issues of executive power, the Court has frequently been split in the last few years, and the issues likely to come before the Court in the next 10 years include the Special Prosecutor Act, which will probably be there in the next few years, the War Powers Act, possibly standing.

I expect that Judge Bork would be a critical vote on those cases. Now whether he would change his views on executive power one can never be sure, but there is a pattern here which has held up during his work as a law professor, as a witness before Congress, as Solicitor General, and as a lower-court judge. The pattern is a consistent one.

Senator SPECTER. Thank you.

The CHAIRMAN. Thank you very much. Senator Leahy.

Senator LEAHY. Mr. Chairman, I am sorry. Senator DeConcini was here.

The CHAIRMAN. Senator DeConcini suggested I go to you because you were here first.

Senator LEAHY. Thank you, Mr. Chairman.

Senator Eagleton, it is good to see you. Your statement was, as is typical, pithy, succinct, to the point—even if my description of it is not—and I am pleased to have you here. I, too, am one of the ones that wish you were still on this side of the table.

Professor Sunstein, I note in your testimony you say that Judge Bork's firing of Archibald Cox was illegal, and you reach that conclusion without reservation, is that correct?

Mr. SUNSTEIN. That is correct.

Senator LEAHY. Do you want to explain it to me one more time, because we had an awful lot of discussion of that, both in the questioning by a number of Senators of Judge Bork, and discussions both with those people who support him and those who oppose him. And at times the definition became a moving target. So, would you explain why you are so categorical.

Mr. SUNSTEIN. I think this is actually fairly clear. The discharge of Archibald Cox was illegal because there was a regulation on the books, a Department of Justice regulation, that said he could not be discharged except for extraordinary improprieties. There were no extraordinary improprieties.

Now it is true that there was a lower-court decision that decided this issue precisely along those lines. It was later vacated as moot.

Senator LEAHY. Now explain why you still point to that. You are referring to the *Nader* case?

Mr. SUNSTEIN. Yes. The decision was vacated as moot because Archibald Cox did not want his job back, not because there was any question about the issue. You do not need a court decision that is still on the books in order to conclude that the discharge was illegal.

I think there is no reasonable argument that the discharge was not illegal. The discharge was in violation of a Department of Justice regulation that is not ambiguous.

Indeed, the vacating of the decision in *Nader* v. *Bork* is especially uninteresting in light of the fact that the Supreme Court in the *United States* v. *Nixon* case approved the exact regulation under which the discharge had been held illegal.

It is as if someone violates the law of speeding by going too fast, and is said to have violated it. You do not need an adjudication if the person was going 70-miles-an-hour in a 55-mile-an-hour zone.

Now an important qualification. This was not a criminal act by Judge Bork, you should not go to jail for it, but it was inconsistent with the binding regulation, and therefore, it was illegal.

Senator LEAHY. And you say that was reaffirmed in *U.S.* v. *Nixon*?

Mr. SUNSTEIN. *United States* v. *Nixon* quoted, with approval, the regulation forbidding the discharge of Archibald Cox except for extraordinary improprieties.

Senator LEAHY. Does that regulation have a standing of law?

Mr. SUNSTEIN. Yes. This is a very old principle. Regulations, while they are on the books, have the standing of law. Justice Frankfurter, incidentally, a conservative judge, was in the forefront in establishing that principle. Regulations, while they exist, have the standing of law.

Senator LEAHY. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Humphrey, and then we will come back, unless one of my—Senator Humphrey.

Senator HUMPHREY. No questions.

The CHAIRMAN. Senator Heflin?

Senator HEFLIN. Senator Eagleton, your statement raises a lot of questions. You mentioned the fact that this could apply on the other hand on congressional standing, and you used the statement at the end that Senator Humphrey must consider and shudder that someday his colleague, Senator Kennedy, might be in the White House as an all-powerful President.

You are not in the mood right now to start any drafting of anybody for President, are you?

Senator EAGLETON. Well, I just wanted to get Senator Humphrey's and Senator Hatch's attention.

Senator HATCH. You did.

Senator EAGLETON. I had originally said "Senator Hatch," but he was not here, so I substituted.

Senator HEFLIN. Well, I have been thinking about what sort of situation might arise on something like that, and I was just thinking that maybe we might have a constitutional requirement that the President has to submit a balanced budget by a certain date, and then he did not do it. We will say he is a Democratic President. Then, under the concept of no standing, a Member of Congress could not bring any legal actions to require that submission of a balanced budget under your theory—that is, if there is no such thing as congressional standing.

Senator EAGLETON. Not under my theory, Senator; under Judge Bork's theory.

Senator HEFLIN. Well, yes, I mean under Judge Bork's theory.

Now let me ask you another thing. I have been reading some articles about the fact that this matter has become a political issue in the campaign, and it causes me some concern. I suppose that the political process involved in the appointment of judges has at least two endings, or two acts, or two standings. One, it appears to me that we have a great number of either judges or academicians who are campaigning long before the appointment occurs; that they either make speeches that would appeal to a President, or that they are doing certain things. And I think we have had several witnesses who have appeared and perhaps who will appear who have at least given us some thoughts that they might be campaigning for the Supreme Court by their actions. That is one aspect.

The other aspect is that when an appointment is made, pro and con—and I am not criticizing either one, because frankly, my arm has been twisted on the right and then twisted on the left so much that both of them now are ready for transplants—but you have a campaign and all of this that is going on, ads being run, television ads, generated mail campaigns—all of this going on.

Now, you being a former Senator and now being a professor, is this harmful to the Court? Is it harmful to the political process? Do you have any thoughts on this—and I suppose there is no way that, if you did think it was harmful, that it could be corrected. Does it end up being a healthy or an unhealthy situation?

Senator EAGLETON. Senator, it has not been harmful for 200 years. This is not the first occasion nor will it be the last occasion when the politics/philosophy of a nominee are brought under close scrutiny.

John Rutledge was nominated for Chief Justice by George Washington. Washington was the single most popular President in American history. He literally packed the Supreme Court with 10 Federalists. However, Rutledge failed for confirmation before a Federalist Senate because of his political philosophical position on the Jay Treaty.

Roger Tauney, nominated by Andrew Jackson. Again, there was a tremendous political/philosophical fight with Clay, Calhoun, and Webster, all speaking and leading the opposition against Tauney. Nonetheless, in this instance he was confirmed by the Supreme Court. Tauney was a close crony of Andrew Jackson.

The Brandeis nomination was intensely politicized/philosophized because of Brandeis' distinctly liberal views back in the time of Woodrow Wilson's Presidency. It was a most contentious confirmation fight based on philosophy.

The Abe Fortas nomination, well-known to many Senators currently in the Senate, was a politicized/philosophized nomination.

This is not the first; this will not be the last. How else can the Senate judge a nominee? Judge Bork is an honest, decent, intelligent man; no one questions on that account. But each Senator must try to make a judgment on the philosophy of the candidate. The President does in nominating. The President's main consideration in selecting Judge Bork was his well-identified views on almost every issue under the sun—either issues that had already been raised, or issues later to be anticipated. By the way, if Judge Bork gets on the Court, he will be boring. We already know where he stands on everything, because he has taken positions on almost everything under the sun.

The President selects in a political/philosophical manner, and throughout history, the Senate has exercised its right to either affirm or reject in the same political/philosophical manner.

Senator HEFLIN. My time is up. I would like to pursue that, though, as to whether it is healthy for the country, but go ahead.

Senator EAGLETON. It has not been unhealthy for 200 years.

The CHAIRMAN. Senator Hatch?

Senator HATCH. Welcome to both of you. It is good to see you again, Tom. Nice to have you back in these halls.

Senator EAGLETON. Thank you, Senator.

Senator HATCH. Let me just say this. Professor Sunstein, you said that there is no record of Judge Bork deferring to Congress. I think that charge does warrant some examination, and I think it is just another distortion.

Let me just say this in backing that up. Judge Bork's critics have charged that in the area of separation of powers, whenever there is a conflict between the legislative branch and the executive branch, Judge Bork sides with the executive. Now, this is an effective argument to make to those of us who are in the Congress, because it suggests that our own institutional interests are somewhat threatened by this nomination.

The premise of the argument, however, that Judge Bork always sides with the executive is thoroughly contradicted by his record. And I would like to mention just two examples of occasions on which Judge Bork sided with us, the Congress, and against the President in matters of what I think were great import or significance.

What is perhaps most extraordinary is that with respect to one of those instances, he was arguing on behalf of congressional prerogatives while he was serving as a lawyer in the executive branch. The issue in that case was the proper use of the pocket veto, the mechanism by which the President can veto a bill while Congress had adjourned and deprive us thereby of the opportunity to override his veto.

Now, Presidents have sometimes claimed this prerogative to utilize the pocket veto before the Congress has reached final adjournment, such as during recesses or adjournments in the middle of a session, or between two sessions of the same Congress. Presidents Nixon and Ford both attempted pocket vetoes of this sort, and this strikes at the very core of our lawmaking authority, since expanding the availability of the pocket veto gives the President an absolute, unqualified, unchecked power to negate or nullify our votes.

Now, it was then Solicitor General Bork who successfully argued within the executive branch against this use of the pocket veto. He did so despite powerful opposition within the White House itself and within the White House senior staff, who wished to extend the power of the President, or presidential power, at the expense of the Congress.

Earlier in these hearings, we introduced into the record the lengthy and detailed memorandum he authored on this matter, which of course ultimately did carry the day with the then administration. And as I mentioned before, what really is perhaps unusual about this incident is that he was Solicitor General at the time, a top executive of the executive branch, and yet he was arguing for a legal position that was detrimental to Presidential power because he believed it to be a correct position.

I would like to mention just one other example of an instance in which Judge Bork sided with us against the President in a matter of critical importance. In this case the issue was the President's authority to impound funds appropriated by Congress; in other words, to choose not to spend the money we had voted to spend. Under the 1974 Budget Act, the President has the authority to impound, but subject to a legislative veto. The legislative veto, of course, was declared unconstitutional. The Reagan administration went into court, arguing that the President therefore had the authority to impound without being subject to the legislative veto.

Now, Judge Bork was one of three judges before whom this argument was made, and he rejected it decisively. He reasoned that an examination of legislative history demonstrated that we would not have given the President the power to impound if we did not know that we would also have had the chance to veto his impoundments.

Accordingly, Judge Bork concluded that if the legislative veto is not permitted, then adherence to the congressional intent requires that the President be denied authority to impound as well.

Again, I think this is an absolutely crucial case involving who would control decisions on spending, and Judge Bork sided with us, the Congress.

So in sum, Mr. Chairman, I think that the charges against Judge Bork on these matters and on a whole raft of other matters reflect the same sort of selective reading on the record as the other charges that have been levelled against him.

He has demonstrated, not only as a judge, but as an executive branch lawyer, as a high official in the executive branch, that he is sensitive to the need to maintain the delicate balance between the two competing branches of government, and that has led him on several occasions, for reasons of principle, to stand up for congressional initiatives and prerogatives.

With that, I would also put into the record a memorandum to the Attorney General from the Solicitor General dated January 26, 1976, regarding pocket vetoes, and just read one sentence in this latter—and it is right near the end, the last paragraph.

"We agree," Bork said, "that a practice of using return vetoes instead of pocket vetoes will make it more difficult for a later President to use pocket vetoes. If the use of return vetoes is the sounder constitutional practice, however, that is not an objection, but a proper result."

So I think that the record is far different from what you have presented, Mr. Sunstein, and I just wanted to bring that up.

The CHAIRMAN. Thank you very much. Although that was not a question, it was a statement, would you like to respond, sir?

Mr. SUNSTEIN. Yes, if I may, Senator.

The CHAIRMAN. Certainly.

Mr. SUNSTEIN. My statement was not that Judge Bork has never been with the Congress. He has occasionally been with the Congress. My statement is instead that the pattern is clear.

Now, in the two cases you have described, Judge Bork rejected positions that were very wild. For him to have taken those positions would have been extreme indeed. Now, let me suggest——

Senator HATCH. Well, there have been some very cogent arguments on the other side of those issues.

Mr. SUNSTEIN. I do not believe so, I do not believe so. He rejected positions that were very, very hard indeed to defend.

But the pattern, Senator, is not controversial, and I think it would be a mistake to suggest that the pattern I have described is controversial. It is not controversial. The War Powers Resolution fulfills Congress' constitutional duty to declare war. Judge Bork has said that it is probably unconstitutional. The Special Prosecutor Act is consistent with the text of the Constitution. Judge Bork's objection to that Act went to the heart of the Act in 1973.

With executive privilege, Judge Bork has suggested a very broad reading, broader than that of any lower court judge of whom I am aware.

The objection to the Foreign Intelligence Act went in the face of the strong view of conservatives and moderates, of the intelligence community, and of the Department of Justice.

Senator, the examples to which you have pointed are correct. Judge Bork is an honest person with a first-rate mind. But on executive power, there ought to be no debate on this one; this one is clear.

The CHAIRMAN. Thank you very much.

Senator DeConcini?

Senator DECONCINI. Mr. Chairman, thank you.

I have a question for Senator Eagleton, but before I get to that, I just want to point out that the memorandum that the Senator from Utah refers to was written, I believe, 14 or 15 months after that case. In one area, at page 10, it says, "and finally, we regard the case to be a particularly inappropriate vehicle for presenting to the Supreme Court the question of congressional standing to sue, a question the Court obviously would have to reach prior to dealing with the merits of the case."

I am not as convinced by the Senator from Utah's argument. But on the other hand, let me ask you this question, Senator Eagleton.

The *Vander Jagt* case was an interesting case. It turned out favorable to how I would like to have seen it politically, but that is neither here nor there. Are you familiar with that case?

Senator EAGLETON. Yes.

Senator DECONCINI. And though Judge Bork held that there should not be standing, and the majority of the Court held there should be, I wonder where do you or Mr. Sunstein draw the line? Is there absolutely no area that the Court cannot say you do not have standing? And what bothers me about it is, sure, I think Congress should have standing, and I think Bork is way out there in the far extreme. On the other hand—and I do not have an answer—it troubles me that any of us can just bring a lawsuit today; go to the Supreme Court, have standing, and thereby get a forum to argue our political views again even though we get dismissed.

What are your thoughts on that, Senator Eagleton?

Senator EAGLETON. Well, Judge Bork, if he is to be followed, makes it pretty easy for everybody. He said no standing under any circumstances, any time, anywhere, anyhow, just across-the-board, and therefore we do not have to think.

Judges, Senator, have to make judgments all the time. That is why they are called "judges." And I would draw the line on restricting it to institutional issues. I do not think that every time a Congressman or a small group of Congressmen have some gripe against the President on some kind of frivolous or relatively minor matter, that they should be running down here to the federal district court, filing lawsuits and having those lawsuits heard.

But where there is a disagreement on an institutional matter—and that is what the pocket veto case was all about—an institutional matter between two branches of government that, as Professor Sunstein pointed out, could not otherwise get to court, except to grant Members of Congress standing, then I believe the court should resolve such serious constitutional disputes.

Senator DECONCINI. Okay. How about in the same branch, like in *Vander Jagt?* Would you grant standing in the *Vander Jagt* case?

Senator EAGLETON. For me, that is a little tougher, but I would grant it standing there as well.

Senator DECONCINI. You would. Why?

Senator **EAGLETON**. I stated it is a little tougher because instead of the two branches of government having a dispute, it is an intrahouse matter.

Senator **DECONCINI**. I mean, here are 14 Republican Members——

Senator **EAGLETON**. I understand.

Senator **DECONCINI** [continuing]. Who say, "Gee, whiz, you know, we do not like what you——

Senator **EAGLETON**. "We got gypped on the allocation of minority seats."

Senator **DECONCINI**. Yes, that is right. "And so, we are going to bring a suit."

And the Court said yes, and I have to somewhat agree with Judge Bork. I just wonder where you would draw the line.

Senator **EAGLETON**. Well, I think I would grant standing.

Senator **DECONCINI**. Would you draw it with five Members of Congress, or where?

Senator **EAGLETON**. Well, I do not think there is any magic in the number 5, 14, or even the 112, or whatever that just filed the suit recently on the War Powers Act. I do not think it is a battle of numbers; it is a battle of substance. The question should be what is the substance before the Court? I think very clearly, on the pocket veto matter, that that is a case in which standing should be allowed. Maybe it gets a little foggier and a little more grey on the *Vander Jagt* case.

Senator **DECONCINI**. I missed your testimony, Senator Eagleton, but will you repeat to me your analysis—I was looking at it here—why you feel the Founding Fathers made it very clear through the separation of powers that there had to be some standing, and yet Bork comes down clearly the other way. Is that correct?

Senator **EAGLETON**. Well, I think it is clear that the Founding Fathers wanted coequal branches of government—clear as a bell. I do not think Judge Bork really remembers that part of it. I think Judge Bork thinks we ought to have a powerful President, a virtually impotent Congress, and nonexistent courts via judicial restraint. I think that is sort of his summary of where we constitutionally ought to be.

Now, as far as standing is concerned, Judge Bork makes it clear that he does not want congressional standing under any circumstances. I repeat, when there is an institutional disagreement between the two bodies——

Senator **DECONCINI**. There has to be somebody to——

Senator **EAGLETON** [continuing]. There has to be some way to resolve the disagreement. And the only way is to grant standing, as in the pocket veto case—as did the majority of the Court in the *Bowers* case. Judge Bork was in the minority.

Senator **DECONCINI**. Would you care to comment, Mr. Sunstein?

Mr. **SUNSTEIN**. Well, the court on which Judge Bork sits has drawn a line between objections that go to the process by which laws become law, and objections to law enforcement. And that seems to me to make some sense. In the pocket veto, there was a constitutional impasse over whether the law was a law. And there, you need a lawsuit to get that one resolved.

Senator **DECONCINI**. Thank you.

I want to thank, Mr. Chairman, if I can, thank the Senator from Missouri for being here with us. We welcome you back. I hope we do not have to wait for another Supreme Court nominee to have you come and testify.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Simpson?

Senator SIMPSON. Thank you, Mr. Chairman.

Professor Sunstein and Senator Eagleton, who—and I must say no one has called me "Stretch" since you left here—you both bring up this issue of congressional standing. And that is one that vexes me. It is a troublesome issue. Senator DeConcini speaks of it.

At least Judge Bork is being quite specific and up front and maybe, as you say, blunt, but all I can say is I am not going back through the reams of history; I am just talking about my 9 years here. If it is going to be the case from now on—and it is more and more cooking along all the time—that if the Supreme Court of the United States is going to become entangled in all major "political" court battles between the Executive and Congress, then the United States Supreme Court will in fact become the dominant branch of this government.

Now, that is the way that that is played out to its final act—having the power to rule over the acts of Congress and over the acts of the Executive, they will resolve those disputes, and those disputes will be filed by the bale in that Court and in lower courts, hoping to get on up.

Now, I do not know whether that concerns you, but it sure concerns me. And you know, I hate to see that distortion come into the argument just because Judge Bork happens to be the focal point which gives rise to that kind of exciting theory, which is not exciting at all, because it simply makes the United States Supreme Court the dominant branch of this government, and nobody had that in mind 200 years ago. I will share that with you.

And Tom, you have seen this operation before and know how we go through these and these confirmation processes; and you know, I think, what will happen in the future ones—I have said this—that in the future ones, they are going to find the most bland people to go on the Supreme Court, people who do not write articles, do not give speeches, do not campaign for the United States Supreme Court—and I think people do campaign for the United States Supreme Court; I think Judge Bork has done that, and I think Professor Lawrence Tribe has done that. And I hold them both extremely high. It would be very difficult to reject Lawrence Tribe as a Justice of the United States Supreme Court, and I think he will be eventually presented.

But let us be honest in this thing and try to just deal with it in a nonobsessive way.

I will finish my question. Professor Sunstein, you said that Professor Bork was an extremist, in response to Senator Thurmond's question, and not a moderate at least on this congressional powers issue. Senator Specter then asked if he is an extremist, how will he be effective in influencing his fellows on the Court. And in reply, you said that they had split, five-four, and that is why.

And my question is, if there has been a five-four split on these issues of congressional powers, how can you possibly refer to Judge

Bork as an extremist if four or five sitting members of the United States Supreme Court apparently completely share his views on these congressional powers issues? That just will not wash.

Senator **Eagleton**. May I respond to the first part of your question, and then Professor Sunstein to the last part?

Senator **Simpson**. Sure.

Senator **Eagleton**. The first part was your observation, Senator, that the Supreme Court had become the almighty branch of government, more powerful than the Presidency and the Congress. I would question that.

The Supreme Court is powerful—not only did the Founders want it that way, but Chief Justice John Marshall made it that way. In his 24½ years, Marshall staked out the territory of the Supreme Court where it could do the very things that you pointed out; it could declare, in a proper case and controversy before it, a law of Congress to be unconstitutional. And for 24½ years, he protected and guarded the Constitution and made it live. So that the courts are coequal with the President—not superior, not inferior, but coequal.

And so any gripe that you may have, Senator Simpson, about the power of courts, I think is a gripe with John Marshall in *Marbury v. Madison,* not a gripe with any subsequent Chief Justice of more modern times.

Senator **Simpson**. Thank you.

Mr. **Sunstein**. I did not use, and I do not like the word "extremist". What I said was that Judge Bork's positions on these issues are not moderate positions, and I will stick to that.

The notion that the cases will be split so that Judge Bork would need four allies, that is correct, but Senator, I think that argument proves too much. If it were the case that anyone—it is the case that no single Justice can render Supreme Court decisions—but that would mean that anyone should be confirmed, no matter how extreme his or her views, because that person would need to get four allies.

I think one should count one-by-one. Justice Douglas was in the view of many an extremist on the Supreme Court. That is a controversial position. But whether or not it is so, Justice Douglas was on the extreme wing of the Court, and he was extremely influential. There is no question about that.

A ninth judge, especially at this point in time—and this is the critical point—the ninth judge will be of huge importance. If it is a judge who has positions that are not moderate on a question like separation of powers—and that is my view of his positions thus far—that is important for the Senate to know, I believe.

Senator **Simpson**. Well, I thank you, but I want you to look at the record. You used the word "extreme"; I did not.

The **Chairman**. Thank you very much, gentlemen. I appreciate your time and your participation.

Our next witness will be somewhat out of order to accommodate his schedule. Unfortunately, we do not have any testimony. We did not expect him to come now, but we are always happy to have him here.

Mr. Griffin Bell is a last-minute addition to today's schedule, at the request of the minority. He is a former federal judge, a former

Attorney General under President Carter, and currently a partner in the Atlanta law firm of King and Spaulding.

Former Attorney General Bell, it is good to have you here. Why don't you remain standing, while I swear you in? Do you swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. Bell. I do.

The Chairman. Thank you, Judge. Would you begin with your statement?

TESTIMONY OF HON. GRIFFIN BELL

Mr. Bell. Well, I do not have a statement. I tried to write out a few thoughts here.

Some weeks ago, Judge Bork called me and asked me if I would consider testifying for him. I have known Judge Bork for some years, and he and I were lawyers on the same side of a lawsuit for some months, maybe a year, just before he was appointed to the court of appeals.

So I told him I would think about it. Maybe 2 or 3 weeks after that, Mayor Andrew Young, who is my friend and client, came to see me and said he was very worried about the Bork nomination because the black community had become almost in fear that their rights were going to be taken away from them. And he asked me what I thought about the situation in general, and we had a long discussion about it, and I told him I was inclined to the view that Judge Bork would not take anyone's rights away from them, but that I would like for him to meet with Judge Bork and hear Judge Bork say that.

I called Judge Bork and made an appointment for him. I then left the country—not for that reason, but for other business reasons.

When I came back, I found they had never met. So I have inquired this morning about that, and Mayor Young sent me a copy of the statement he made here to the committee, but I have not talked with him anymore. He sent me a message that he came to testify because he felt like he should and should say something. What happened is he never called Judge Bork to meet with him. I do not know if that was a good thing, a bad thing, or a proper thing, even, but I thought that it was something to be concerned about; that Mayor Young, for whom I have a very high regard, was worried.

I have taken it on myself to read a lot of the things that Judge Bork has written or said. I think I have a pretty good feel for his views on privacy, antitrust, particularly in foreign intelligence, the executive power to formulate foreign policy, and whether there is such a thing as a political question which cannot be ruled on by the Court—something that this last panel was talking about. And I am prepared to speak to those things.

I decided that I would not read anything that was sent to me by the White House; but I did read, and decided to do this—I made this as a conscious judgment—that I would read what Senator Biden sent me, which was something written by two professors, whose names are Peck and Schroder, which in their documents, says it was reviewed by Floyd Abrams, Clark Clifford, Walter Delinger, and Lawrence Tribe. Senator Biden wrote me a note and said he thought I would be interested in it, and particularly I ought to look at the section on privacy and antitrust. I have done that, and I am prepared to address that paper.

I must say that the paper, while excellent, seems to set out the qualifications for a Democrat, somebody that a Democratic President would have nominated, and to see if that President met the test that maybe President Carter would have wanted the Supreme Court to meet.

It does not address whatever the test ought to be for somebody put up by a conservative Republican who ran on that issue. That was an issue in the last campaign. And that is the problem I have with the paper. I do not think it makes out Judge Bork to be anything more than a conservative. I was looking to see if he was a radical of some sort. I would not vote for a radical to go on the Supreme Court. But on privacy, I find that his views, for example, on the *Griswold* v. *Connecticut* case, are precisely the views that Justice Black and Justice Stewart had—neither of whom have I ever thought of as a radical.

I find that I do not agree with Judge Bork on his views about the *Griswold* case; I do not agree with the majority opinion written, the plurality opinion, written by Justice Douglas. I find myself in agreement with the special concurring opinion by Justice White. Justice White had found this right of privacy as it was there described, not some privacy in the abstract, but the facts, the facts of the sanctity or the merits, he found that that could be a part of the concept of liberty in the 14th amendment, which you could protect by the due process clause of the 14th amendment. Justice White then dissented in *Roe*, because he did not find abortion to be included in his concept of liberty under the 14th amendment. He also dissented in the *Hardwick* case, which was a sodomy, a homosexual case, on the grounds that homosexuality was not a right of privacy.

So I point that out to show that reasonable judges can differ about what privacy means. We need to disassociate ourselves from the idea that there is any abstract right of privacy. Privacy is just a name given to whatever the facts may be that are before the court—in one, it was a contraceptive law in Connecticut; the next one was abortion; the next one was the sodomy law. We do not know what the next thing will be.

But the point I guess I am trying to make is that Judge Bork's views seem to me to be the same as those of Stewart and Black, and my view would be the view of White, who did not join in the majority opinion, but concurred in the result.

One of the best things in all of those opinions is what Justice Harlan wrote. He said he did not concur in the opinion of the majority at all, but he did concur in the result that the law should be stricken. He tells in there, he lays out the best rule that I have ever seen on how you decide what a right is under liberty and what a reasonable concept is under liberty; how you administer that right. And it is not due process in the substantive sense, but it is just protecting liberty. And he says you have to have an educated people who understand history and the traditions of our nation, and you take all those things plus the facts into consideration, and then you make your decision.

One of the things I like about Judge Bork is he is not only bright, but he is contemplative and reflective and sensitive, it seems to me, and he is working all the time to compare whatever is before the Court with the Constitution, and he is trying to find things under the Constitution. I like that about him.

I was once a judge myself, and we had a brilliant judge on the court, a young judge, and one of the older judges asked about him and said, "What do you think about Judge So-and-So?"

He said, "Well, he seems to me to have a brilliant mind, but it is loose at both ends."

I do not want a judge who has got a mind that is loose at either end. I want him to know what the Constitution means. I want him to understand that not all of my rights come from the Constitution. The people that were living at the time the Constitution was adopted had a lot of other rights. They were trying to save some of the rights they had by the Bill of Rights. They were not trying to say those are the only rights we had. And that is where this right of privacy comes in.

We have the right to freedom of association, the right to travel. One of the great rights we have that has never been developed, that has been mentioned in the Supreme Court, is the right to be let alone, and as society becomes more complex, we will be thinking more and more of the right to be let alone. That will not be found in the Constitution, but it is certainly a right.

We get a lot of those rights from the common law. Some people call them natural rights. I guess Jefferson probably would have spoken of some of these rights as natural rights, but they are rights that we all have.

We have some rights because we get them under a State government, some because we get rights under the federal government, and we can't just go by what people said or what the Founding Fathers said. We have to take into mind all of the amendments to the Constitution, particularly the war amendments, 13th, 14th, and 15th, and what the 14th says about life, liberty and property and the due process clause to protect our rights.

We have to take into consideration the 19th amendment which gave women the right to vote. That changed the our whole thinking toward women. It didn't just happen in America. It happened all over the world. I was just in Turkey. In 1924, Ataturk freed the women of Turkey, and it has made a great difference in Turkey today over what it was then. That in a sense is what happened in this country. Women now have the same rights as men, and should. We do that under the equal protection clause.

Those are my views. I think Judge Bork is in the mainstream. I wondered a good deal about if we do not get Judge Bork, who will we get? Here is a very bright person. We have to be very careful in this country—we do it from time to time—we have become anti-intellectual. It would be easy to get somebody confirmed who has never done anything, has never taken a controversial position on anything. But that is not the kind of person we want. We want somebody who has written a lot and who has said a lot and who has been examined about what he has written and said. And when all is said and done, if we think he is believable, then he is no more than a conservative. And the President has a right to put up a conservative. And if Judge Bork is not confirmed, he will put up another conservative. If that man is not confirmed, he will put up another one. So I would not be willing to let a good man go when I do not know who else is coming down the line.

I would myself vote to confirm Judge Bork, and I do so on the view that he is sensitive and he has never taken any right away from anyone. And he may be conservative in the sense that he will not find new rights, but I do not know what facts are coming up that might give rise to a new right. But I do not see any sign that he would take any right away from anyone.

As far as these foreign intelligence cases and the power of the Executive, I think we have to be very careful we do not throw our Constitution out of balance by letting the Supreme Court become the arbiter between the Executive and the Congress. I lost some of those cases and won some when I was Attorney General, but I am very familiar with what a political question is. Justice Brennan wrote in *Baker* v. *Carr* quite a dissertation on what a political question is, and I think a lot of our journalists and professors, even, should go and read that opinion so we know that they come back to the view that the Supreme Court is not supposed to referee between the Congress and the President in all matters.

I think I have gone on too long, Mr. Chairman.

I want to congratulate the committee on the reasoned approach you have taken in the hearing. I think you had every right to go into all the things that you have gone into. I have never seen a better hearing than what is being conducted here in the Bork matter.

Thank you.

The CHAIRMAN. Thank you very much, General.

Let me begin by reminding you that, although I am told it is an old Yiddish expression, "Better the Devil you know than the one you do not," and that seems to be a refrain we have heard several times—not that Judge Bork is a devil, but better the person you know than the one you do not; we do not know who will be sent next if he is rejected. But it seems to me my responsibility as Chairman of this committee is to deal with them one at a time.

Did you have an opportunity—I know you were necessarily out of the country—did you have an opportunity to hear and/or review any of Judge Bork's testimony?

Mr. BELL. I did not review his testimony, but I read everything that the New York "Times" carried that he said, and then some other papers, but I went back and got the New York "Times" and had everything copied that had happened at the hearing, and read them all in one sitting. So it was quite a bit of reading.

The CHAIRMAN. You—and I am not being facetious when I say this, General—you make an extremely compelling case for Judge Bork and an extremely compelling case against Judge Bork, all at the same time, it seems to me.

You point out that—what I pointed out when I opened up the hearings—that I believe firmly that my rights, as a human being, are not derived from the Constitution. I have them because I am.

And as you point out quite eloquently, more eloquently than I, that not all of your rights are conferred upon you by the Constitution, and you indicate that there are others, and you list them, some of them, including the right to be left alone, as you point out, in years to come, will become more compelling, or more controversial.

And you then said that "Although he will not take any existing rights away, he will probably not acknowledge any new rights."

And quite frankly, that is the crux of my concern. I would point out that Justice Stewart, who you quote, who you mention, and Justice Black, and every other Justice that I am aware of, has at one time or another recognized that there is a right under the liberty clause, or under the substance of due process, or under any other aspect of the 14th amendment.

And in constant questioning on the issue of privacy, the general right of privacy, to the extent there is one, and enumerated rights of privacy, Judge Bork, unlike any other Justice I am aware of, finds those rights as to not be existing unless they are enumerated.

He goes back and he does not—this is the only area that I am aware of, unlike in the area of free speech, first amendment; unlike in the area of affirmative action; unlike several others in questioning—it is the only area that he does not qualify or change his views.

And so he says, under constant questioning—and I apologize because I was not aware you were going to testify next and I do not have the record in front of me—but he says time and again that our rights are protected. Rights of privacy he finds in the fourth amendment. He reads out of the Constitution the ninth amendment, just reads it out.

And he goes down the list of where they are found. He talks about the first amendment, there are basic privacy rights that are encompassed in that, and so on.

But he does not, unlike Stewart, who, in *Roe* v. *Wade* found a right of privacy; unlike Black who in fact found the notion of due process to have meaning in *Bolling* v. *Sharpe*.

Unlike others, he is the only one that I am aware of—and I am going to stop and ask you to respond—the only one I am aware of that does not find any generalized writing in the liberty clause. He rejects substantive due process.

Now admittedly, he does not go back and say "I will overrule every one of those cases." He does not speak to that.

But can you comment on the fact that he seems to be totally inconsistent with your view, and I asked him specifically.

Mr. BELL. Well, you know, that last case you cited, *Bolling* v. *Sharpe* makes the point I am trying to make, and that is that there is no abstract right to privacy, for example.

Bolling v. *Sharpe*, they read an equal-protection clause into the fifth amendment.

The CHAIRMAN. Correct.

Mr. BELL. In the Washington school case.

The CHAIRMAN. Correct.

Mr. BELL. And that is a race case.

The CHAIRMAN. Correct.

Mr. BELL. That was the only way they could address the District of Columbia where they had segregated schools——

The CHAIRMAN. Correct.

Mr. BELL [continuing]. As to find an equal protection, federal right.

The CHAIRMAN. Right.

Mr. BELL. And they had no trouble doing it, but they could not do it against the federal government under the 14th amendment.

The CHAIRMAN. Correct.

Mr. BELL. So they reached out and said that due process has got to mean, has got to include an equal-protection right in a race case.

I would imagine that Judge Bork would probably agree with that. On race cases, I never find anything unusual about him in his views.

I think Judge Bork is trying to say—and he can speak to what his views are better than I—but I think he is trying to say that "I cannot find any abstract right to privacy in the Constitution."

But there can be factual situations which would be protected by the due-process clause of the 14th amendment. They would either come under liberty, or life, or property.

The CHAIRMAN. Judge Bork does not say that, Judge. I wish you would read his testimony. He specifically does not say that, and my time is up, but he specifically rejects that.

Mr. BELL. I read he said that he had not excluded all circumstances. There might be some other basis, he said.

The CHAIRMAN. He said he had not thought of any, and he has been writing about it for 26 years, Judge, but my time is up.

Senator THURMOND. Well, let him finish.

The CHAIRMAN. Oh, yes, sure. I did not mean to cut you off.

Mr. BELL. No. All I was going to add was that I did not mean to say he would never find any other right. I do not think we have any more rights, that have not been dealt with, that are spelled out in the Constitution. We have to get under this liberty concept, or property concept, that sort of thing. And in that respect he is conservative.

The CHAIRMAN. Well, I just hope he finds those. I am not looking for any new ones. He has not found the old ones yet. But I yield to my colleague from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

Judge Bell, we are very pleased to have you here. I recall when you were Attorney General and you served ably and well. We are proud of you.

Mr. BELL. Thank you.

Senator THURMOND. Now do you feel that Judge Bork is in the mainstream and is not an extremist?

Mr. BELL. I do. I do not consider him to—well, I would say radical, but an extremist and a radical is the same thing I guess. I look on the, about 15 percent on each end, as being extremists, and radicals, there is not that many.

Senator THURMOND. There has been a lot of talk here, and a lot of questions going into issue after issue after issue. The main thing I think the public is interested in—is he an extremist, way out, one way or the other? Is he going to be fair? Is he going to be reasonable? Is he going to be just?

How do you feel?

Mr. BELL. Well, as I say, if I was in the Senate I would vote for him. I think he is a conservative, but he is principled, he is rational, and I think that he would not wear any one's collar. I doubt President Reagan knows what he would do, and I like that. I like to see a man go on the Court who is going to be his own judge, be his own man, and I think that is the way it is going to turn out.

He is going to do whatever he thinks the Constitution means, and he is searching all the time. He has grown from the time he was a young law professor to now. He has grown a great deal. He has changed his mind about things. I like that.

I hate to see someone who is so rigid that they never change their mind. So I think he is in the mainstream myself, on the conservative side.

Senator **Thurmond**. Do you feel that he has the qualities the American Bar Association considers for a Supreme Court Justice, and that is, integrity, judicial temperament, professional competence?

Mr. **Bell**. Well, he has all of those. No one has contended he does not have those qualities. I think everyone would be unanimous on that. The American Bar apparently got off into something different, which is they have got a way of defining temperament. If you are a conservative, you have got bad temperament. I hate to think about when we get a Democrat back in, we are going to have the same problem.

Then, if you are a liberal, you have got bad temperament. That is no way to select, to pass on anybody's qualifications. I am sorry to see that they have done that.

Senator **Thurmond**. You feel that he has the courage, and the dedication, and the willingness to make a good Supreme Court Justice?

Mr. **Bell**. I do.

Senator **Thurmond**. Do you know of any reason that this Senate should turn him down, this committee should turn him down?

Mr. **Bell**. I do not know of any reason, and I have looked for one, but the only reason I can see is he is too conservative, and you hope the next person will not be as conservative. But that would not be a good reason. I do not think that any Senator would vote on that basis.

I do not know of any reason, to answer your question.

Senator **Thurmond**. If you were on this committee and in the Senate, would you vote for him for the Supreme Court of the United States?

Mr. **Bell**. I have already said I would.

Senator **Thurmond**. Thank you very much. That is all.

Senator **Kennedy**. Judge Bell, I, too, join in welcoming you back to the Judiciary Committee, and remember many different occasions when we worked closely with you. You have had a distinguished career as an attorney, as a judge, and as Attorney General.

So we welcome you back, and we take your views seriously, and I think you have gathered that, certainly, by the reaction from the members of the committee.

I think many of us can look back into the period of the early 1960's as a time of turmoil and unrest, and I think you were one of the really important voices in Georgia, and in Atlanta, of moderation and progress, particularly on the race issues.

And you drew to mind today your own conversations with Andy Young, who was a young leader then and a strong believer in nonviolence in trying to strike down the barriers of discrimination in our society, and he came here and made an eloquent statement about the New South.

Chesterfield Smith spoke about the New South as well. And the concern that Andy Young had talked about is the desire of not going back and refighting old battles, reopening old wounds. And whether a person that had taken such a harsh position on the Civil

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Rights Act of 1964, in terms of public accommodations—what would Atlanta look like today if they did not strike down the prohibitions in terms of the hotels and the railroads, and the——

Is that 5 minutes?

The CHAIRMAN. It was not reset, the staff says. I might note your staff and my staff are both doing it. I am not sure what it means.

Senator KENNEDY. To refight the old battles, and they were pointing out the areas of public accommodation, the discrimination in employment, the Congress' power to strike down the literacy test which had been used to deny people the right to vote in the South.

Chesterfield Smith made a powerful case about the outcome of the one man, one vote rule, and how it moved power from Washington back into Florida.

And the sense that I gathered from the former distinguished president of the Bar Association, Chesterfield Smith, and by Andy Young, with the extraordinary prosperity and growth, and, in dealing with the problems of race in that community better than many cities in the North, including parts of my own State—that the real kind of question, whether they should really take this risk, whether they should take this chance, whether they should really be willing on the issue of civil rights which has scarred the country—whether it was at the time of the Constitution or the Civil War, or the early 1960's—that issue is behind us in many respects. It is present in other respects, but it is behind us.

Would we really want to risk going back to those old days? And let me just say, finally, Judge, you know, I have been on this panel for a number of years, and voted for Warren Burger though be had a different political philosophy than I do. I voted for Justice Stevens and voted for Justice Powell. I voted for Justice O'Connor, and voted for Justice Blackmun. I voted for Justice Scalia.

And I hope we are not going to get back into a situation where just because we have this individual, nominated by this President, that we have to raise what I think is really not an appropriate kind of a recommendation. As you well know, we have had 300 federal district and circuit court judges proposed by this administration and there have been less than ten that have been challenged. This one is, and for important reasons, as you have heard, on privacy, and civil-rights questions, on first amendment issues, and on the role of the Congress and the Executive—all serious issues.

But let me just go back to the other question. What would the South of today, your home region, look like if the positions that Judge Bork had taken had been sustained, had been the majority opinions in the Supreme Court? And had they been positions that had been maintained by the Congress?

Mr. BELL. Well, the public-accommodations law which he opposed at the time, there were thousands of people, lawyers or judges who opposed it, and one of the great things Senator Russell ever did for our section was when the Congress passed the public-accommodations law, even before the Supreme Court upheld it.

He said that this is now the law, and it is up to everyone in the South to obey it. That turned the tide. People started obeying the civil-rights law. It was accepted. We never went through the same thing with the public accommodations that we had to go through with the school cases, for example.

I would think that Judge Bork, having that view, was a—well, a lot of people had the same view. That is over with. I think he——

Senator **KENNEDY**. Poll tax?

Mr. **BELL**. Poll tax.

Senator **KENNEDY**. One man, one vote. Public accommodations. Employment.

Mr. **BELL**. Well, on one man, one vote—as I understand his position—that you do not have to have precisely one person, one vote—not one man, one person. That you might have a variance on a reapportionment of 2 percent, 5 percent. We wrote many opinions saying that in the fifth circuit, and then the Supreme Court corrected us and told us we were wrong. It had to be precisely that.

On the poll tax, no one could argue that you could not have a poll tax for a dollar. It would not be racially—that would not have anything to do with race, but it would be such a nuisance that you would not want to do it anyway.

But the poll tax was—in fact the way it was administered in the South, was used to keep blacks from voting. I was in a lot of voting cases when I was a judge. I know a lot about that.

But if you were a professor, sitting around somewhere, arguing in the abstract, that you could have a dollar poll tax, you would probably say, well, you can have a dollar poll tax. If I do not know any other facts. That is where a lot of these things come from, I think. I doubt he would be right now saying he wanted to put a poll tax back on. If he did, it would be like saying I do not wish to be on the Supreme Court. I do not think he would do that.

Senator **KENNEDY**. My time is up.

The **CHAIRMAN**. Senator Hatch.

Senator **HATCH**. Well, Judge Bell, it is great to see you back here again. As you know, I have great affection for you and appreciate the leadership and the service that you gave.

You have had a very distinguished career from entering private practice in Savannah, Georgia in 1948, and in 1953 joining the law firm of King and Spalding as a partner. You became chief of staff in the Georgia Governor's office until in 1961 you were appointed by then-President Kennedy to the Fifth Circuit Court of Appeals.

So you have had a distinguished record there, where you heard some 3,000 cases and authored over 500 opinions. And you served with great distinction on the bench for 14 years, before stepping down to go back to your old law firm back in 1976.

And then, in 1977, you were nominated by then-President Carter to become the Attorney General of the United States, and I for one was here, and I want to tell you how much I appreciated the service that you gave to this country.

Now you, during that period of time, carefully reviewed all kinds of judicial candidates for positions. Am I correct?

Mr. **BELL**. I did.

Senator **HATCH**. In fact President Carter had almost as many appointments in that 4-year period as any President in history.

Mr. **BELL**. I personally reviewed over 200, and President Carter had, I think, 260 or 270.

Senator **HATCH**. That is right. He had——

Mr. BELL. Not as many as President Reagan, but he had a substantial number.

Senator HATCH. He surely did. So you are fully familiar with the process and what type of people should go on the courts in this country.

Mr. BELL. Well, I never went through the appointment of a Supreme Court Justice.

Senator HATCH. I see.

Mr. BELL. President Carter did not have a chance to appoint anyone to the Supreme Court.

Senator HATCH. But my point is you have had a lot of experience——

Mr. BELL. All of the judges.

Senator HATCH. All right. You were involved, as I see it, in a number of judicial appointments in the Carter administration.

Have you ever seen, of those many appointments—did you ever see a campaign with such special-interest group pressure like that which is surrounding this present nomination?

Mr. BELL. I did not, but I well remember the Haynsworth nomination. I was a judge myself then, and I remember all about the Haynsworth case because he was a Southerner and we were all pulling for him. I remember that.

You see, during my time as Attorney General, we did not have a Supreme Court appointment. People get fired up about a Supreme Court appointment. It is easy to write about it. It has got a lot of glamour to it, a lot of appeal, and it just sort of builds up. It takes on a life of its own.

Senator HATCH. But I think what I am getting to is this: Over the past several weeks, we have heard arguments by some of Judge Bork's opponents that he should not be confirmed because he will vote, as they see it, "the wrong way" in a particular case or on a particular issue. And we have had a number of particular cases or issues that they think he might vote "the wrong way" on.

Mr. BELL. If we could get President Eisenhower to come back, he would probably have a few words to say on that.

Senator HATCH. I think so, too.

Mr. BELL. Or Teddy Roosevelt about Oliver Wendell Holmes. I mean, who knows how somebody is going to vote. You put them on the Court to use their best judgment.

Senator HATCH. Well, I am troubled by the implications of such an approach to the whole confirmation process, and specifically with the Supreme Court. So I was wondering if based on your 14 years on the bench and your total experience, including your experience as an Attorney General, if you would comment on what effect you think this single issue approach to confirmations might have on the independence of the Supreme Court.

Mr. BELL. Well, I have not really worried about it until today. When I got up this morning and read in the paper that the polls showed that the majority of the people are against Judge Bork, it struck me that we have abandoned the constitutional process for confirming judges, selecting and then confirming judges, and that we are going now into the Gallup poll business.

Too much in recent times, I think, has the President and the Congress gotten into the habit of trying to find out what the people want before they vote. I think this is one of the worst things going on in our country. Now, if we are going to pick Supreme Court Justices by what the people want, we are going to be in bad shape. The people do not know as much as the members of this committee know, and it is up to the committee. Mr. Jefferson said that in a representative form of government you are elected and then you owe the people your best judgment. You do not need to get a poll on how to vote. That has nothing to do with it. You are supposed to use your best judgment.

That worries me now, that we are running polls daily now to see what the people want for the Supreme Court.

Senator HATCH. Even the polls are mischaracterized, but the one this morning that was mentioned was the Lou Harris poll. I challenge anybody here to look at the exact questions that were asked by Mr. Harris. He did exactly the same thing to now Chief Justice Rehnquist. It was so bad, it was so utterly detestable and irresponsible that even the media back here did not print—at least I did not see it printed on the Rehnquist thing.

Mr. BELL. I am not worried about that kind of publicity having any effect on this committee. I would be more worried about it affecting the Senate at large.

Senator HATCH. Well, you are right about that.

Mr. BELL. This committee has gone into everything. You have had a very detailed hearing.

Senator HATCH. Well, let me make one other comment. I think the people out there, all these special interest groups, if you look at what they are and who they are, you find that there is a lot of concern, because they know that Judge Bork would be a very tough law-and-order judge. He would not put up with the drug pushers and the problems that we have in this society today. I think they know he is going to be a strong supporter of the constitutional death penalty. There is no question that there have been all kinds of other problems that he would probably come down hard on pornographers. You could go on and on, the excessive regulation of small business.

This is the side that is not being told here, that he would be the type of judge that the people in this country have wished for for the last 25 years. But because of these special interest castigations and, I might say, vilification and disinformation, because they have been distorting his record, they have been distorting his cases, they have been distorting what he says. Of course, they are taking it away from the real issue of getting a judge that might be somebody who could help turn the mess around in this country, especially criminals lawyers.

Mr. BELL. That has all become part of the political process in this country. You know, it is morals of the marketplace. Everybody has got some interest group. The Senate has to rise above all that.

Senator HATCH. I agree.

Mr. BELL. You listen to everyone and then use your best judgment.

Senator HATCH. I agree. Thank you, sir.

The CHAIRMAN. Thank you. I would just like the record to show what we all know, but it is important sometimes to state the obvious: That this committee has not at any time commissioned any poll. Not that the General is implying that; no one was. But I want to make it clear. The polls that are being conducted are being conducted by the press, which is their right to conduct any poll they want. The committee is not, no Senator that I am aware of is conducting any poll.

Secondly, I would hope that we would refrain from engaging in the public opinion process. No one on this committee has suggested that Judge Bork would not be tough on crime, tough on drugs, tough on pornographers. That is what we call a red herring, where I come from. But let us make it clear: Nobody on this committee, no Senator that I am aware of, no one has conducted a poll. To the best of my knowledge, no one on this committee is listening to polls. We will vote on what we believe to be the strength of the testimony given by the witnesses and by the nominee.

I yield to the Senator from Arizona, Senator DeConcini.

Senator DECONCINI. Thank you, Mr. Chairman.

Judge Bell, we welcome you here. You, indeed, have had some influence before on appointments, not only when you were Attorney General but with this Senator. You have, I think, been most forthright in your observations, and you have testified on many subjects.

If I heard you correctly during your statement, you not only complimented the Chairman of this committee for conducting fair hearings, but you thought this process was very worthwhile and proper; and that all of these questions, as inane as someone on that side of the aisle may feel they are or someone on this side of the aisle may feel that they are, you felt that it was a good process.

Did I understand you correctly?

Mr. BELL. You did. And I think it is very much in the public interest.

Senator DECONCINI. That is the process here. You know, I have not made up my mind, but I respect those who have and I respect them for being able to come to that conclusion when they did. But I realize these special interest groups, some are out to get him, some are out to protect him.

You know, it does not make that much difference to me because I have got to make my judgment whether that interest group is right or wrong. I will listen to them, but I am not going to make a judgment on it. I appreciate your candidness. Notwithstanding polls or what have you, this is the political process. If the polls came out and showed that the public was favoring him, so what, as far as this Senator is concerned. While I do not pretend to be above politics, I am not going to make my judgment in this issue based on what the polls are, one way or the other.

You mentioned something of interest to me that caught my attention. You said you considered 15 percent of each spectrum—far right, far left—to be extremist.

Mr. BELL. Extremes.

Senator DECONCINI. Extreme, yes.

Mr. BELL. I did not put it on a personal basis.

Senator DECONCINI. Extreme. What kind of views would you consider fall into those extreme areas? In your judgment, how far do you have to go to be an extreme person or nominee or on an issue? Can you think of an example? I am trying to just clarify.

Mr. **Bell**. I do not want to give my views on the extremes of the right and left. It would make a great newspaper story, and I do not think it would——

Senator **DeConcini**. No, I do not want to write headlines with Judge Bell in them either.

Let me ask you this: Based on this 15 percent at each end of it, where do you think Judge Bork fits?

Mr. **Bell**. I would say he is right of the center.

Senator **DeConcini**. Right of the center.

Mr. **Bell**. Yes, and he would be—I do not know just where he is right of center, but he is definitely right of center. Any conservative, I would view myself as being right of center. But people always say, "How do you classify yourself?" I say I am a moderate to conservative. I keep to the right.

Senator **DeConcini**. And that is where you would classify him?

Mr. **Bell**. No, he is more to the right than I am.

Senator **DeConcini**. More to the right than you are.

Mr. **Bell**. You see, I agree with White about the privacy opinion. That would make me a little different from Judge Bork.

Senator **DeConcini**. You know, I value your analysis of Judge Bork. The fact that he has been a law professor, written a lot, and made many speeches—that has been his avocation, his profession. And I can understand it being provocative.

Mr. **Bell**. If he would adopt the idea that liberty is an evolving concept under the 14th amendment, he and I would probably be the same. But I have adopted that. That does not mean I would not take a conservative approach to that.

Senator **DeConcini**. I understand, and I think that is an important point. One of the areas that troubled me is that a person of Bork's character and competence and professionalism, could take the intellectual approach he has taken over some 20 years plus. Yet when he looks at privacy, he told the chairman of the committee that he would have to uphold that Connecticut statute if it was before him again. Here is a man that has extended himself with great effort to intellectualize why one case should fall into this area and what the framers had intended, and yet he could not come up with some right of privacy, whether it is under the liberty phrase, in the 14th amendment due process clause or what have you.

Does that trouble you at all, where he has been able to intellectualize an answer to most other things one way or the other?

Mr. **Bell**. Well, Stewart takes his position.

Senator **DeConcini**. Well, I am not asking about Stewart. I am talking about Judge Bork. I am trying to figure who this guy is, really. And I can compare him to Stevens on one issue or another. But I am trying to figure out if there is anything wrong with the fact that he has not been able to intellectually find within the Constitution—and not the ninth amendment, because as the Chairman pointed out, Judge Bork does dismiss that—a right of privacy. Why do you think he would have trouble doing that? Do you have any observation?

Mr. **Bell**. Well, I am not certain he has adopted the idea that any of the rights that we have outside the Constitution can be protected by the federal government under the 14th amendment. I am not certain he has come to that position. You would have to ask him that himself.

Senator DeConcini. We did.

Mr. Bell. Until you come to that position, you would take the same position Justice Black and Justice Stewart took in the Connecticut case, which is we cannot find it in the Constitution. That is all Judge Bork is saying: We cannot find it in the Constitution.

I think a lot of constitutional scholars would agree with that approach to it. They say that the approach I have, Justice White had, is loose-ended. I mean, how do you control it? What will be the next thing that falls under the concept of liberty? Well, that is why we use these phrases like "deeply rooted in our traditions," "fundamental in our thinking," "part of a civilized society," those sort of things.

So in the end, you are left with the judges and what they think. You know, they are educated people who understand history and understand the desires of the people and what people have always wanted to get out of the government, what they aspire to. Those are the sort of things that these judges—that is why we have to have smart people on the Supreme Court. They are not supposed to make laws, but in a sense they do, although they do not do it, I think, intentionally, because they are construing the Constitution.

Senator DeConcini. Thank you, Judge Bell. Thank you, Mr. Chairman.

The Chairman. Senator Simpson.

Senator Simpson. Judge Bell, General Bell, it is a great pleasure to see you, sir. You are one of the first gentlemen I met in my time here when I came to this town, among the first cadre who paid me a visit, you will recall, when I was in the dungeon chambers in the Russell Office Building; like the sewers in "Les Miserables."

I have moved out of there now. I am not in that location any more. God knows who is. It was 6 months of habitation there. I remember it distinctly.

One of the things that you said is very true. When we go back to the floor to vote, our colleagues will come up to us and say, "How is it going?" And if they are just reading about it or seeing it, they are distressed. They say, "Has he got a chance?" I would say, "I do not know. I think he has got a good chance, but it will not happen until we get here and the other 86 get to play."

It is just 14 of us players now and doing, I think, a very credible job. I hope so. The Chairman is, the Democrats and Republicans alike. We have 86 other players in this game, and the sooner they get in the better because that is where it will be decided.

So I thank you for the courtesies you have extended to me, and you have said that you have not seen one probably as politicized as this. I surely have not, and I do not know if we ever will again. I think we have seen the last of this kind of hearing because people will simply clam up. They will not answer the questions, and they will have every right to do that.

So thank you for bringing your uncommon degree of common sense to our deliberations. That is what made you such a remarkable official of the Carter administration.

Now, almost all morning we have been talking about the right of privacy in some way, which has been interesting to me. Maybe I am naive. I listen to us speak about the right of privacy with regard to *Roe* v. *Wade, Griswold* v. *Connecticut,* those kinds of cases, theory, dissents, majorities. And then I come across a fascinating article. Maybe this does not mean anything to anyone. I bounced it off the heads the other day when I talked about how they had gone to find what videotapes were rented by Ollie North—you know, interesting.

Now, we have an article called the "Bork Tapes" from some outfit called the "City Paper." It is free and it certainly should be. It is certainly free to write these kind of articles and publish it.

But let me tell you: It seems more real than anything I know about the right to privacy after practicing law for 18 years. Maybe it is fun to check the video rentals of Ollie North and Judge Bork. Will it be as much fun to check them of Robert Woodward or Colman McCarthy?

Now, you can laugh and you can chuckle, and you can go "Ho, ho," but let me tell you, this is fascinating. You remember how the people of America responded when we had the copyright law and you could not dub something in your home. And they said, "We do not like that. We have the right to do anything we wish with video equipment and tapes in our home, and that is the right of privacy." You said it beautifully: The right to be let alone.

Well, to me, if you want to read that, I did not want to mention it or trot it out because I did not want to give it relevance, but it deserves all the ridicule you can give it.

The CHAIRMAN. If the Senator will yield on the Chairman's time?

Senator SIMPSON. Yes.

The CHAIRMAN. I want to join you and concur fully with what you are saying here. Quite frankly, I think it is reprehensible, and it is an embarrassment. I mean, absolutely embarrassing that a Supreme Court nominee would have someone going down and looking at what videos he or she rented.

I think it is an embarrassment, and I am glad you called it to our attention, and I concur fully with your sense of disgust and outrage on what was done.

Senator SIMPSON. Well, Mr. Chairman, I thank you. As I say, it is something that is easy to pooh-pooh. It is, when it is against a public figure, but none of us would like it. Not one of us. And I do not have a collection. I do not have a dungeon full of X'ers or triples. I really do not. But I tell you, it is an arrogant, smart-aleck, super sarcastic, puerile and smug and pathetic article. And I guess a real statement is it says, "The only real way to figure out what someone is like is to examine what that someone likes. Take a hard look at the tools of leisure he uses to chip away life's rough edges."

And "If you were a nosy Washington reporter and a little bird offered to slip you a copy of the complete list of VHS tapes rented from a D.C. video store by a prominent citizen being considered for a gig doing vocals with the Supremes, would you scream first amendment, Ollie, Ollie, Oxen Free, and start doing your news hawk dance, succumbing utterly to the febrile desire for sensationalist scab-pickin'? Well, it is dirty work, but somebody has to do it, says this cat."

Then he says, "Despite what all you pervs were hoping, there is not an X in the bunch and hardly an R."

Now, that is really something. To me, that has more to do with the right of privacy in the United States of America than all the *Griswolds* and all the *Roe* v. *Wades* that will ever be scribbled. I hope that my chums at the ACLU might look into that one, and Jerry and Mort and some of the crew. I will join you on that if you have any sense that that is kind of offensive. I would like to review that.

Well, enough of that. I have been wanting to say that. All you can get accused of there is, well, what does that have to do with this? It has a lot to do with this because it is real and it is today and it is offensive.

Well, I did not even let you answer a question, and I really do not have one. But I had that stuff heavy on me. Thank you for coming.

Mr. BELL. I would like to comment on that.

Senator SIMPSON. I would like your comment.

Mr. BELL. We have been dwelling on law professors. The first discovery of the right of privacy was by a law professor whose name, I think, was Warren and somebody else. It was two people who wrote the Law Review article years ago. The first State in the Union to have a Supreme Court to adopt a right of privacy was the State of Georgia, and the name of the case was *Pasovich* v. *New England Life Insurance Company*. It was around the turn of the century.

There, someone had taken someone's picture and run it in an advertisement, and the person had not consented to it. That person brought a suit against the insurance company for invading his privacy, a tort. The court upheld it. That is the way it started.

This sort of thing here that you have just alluded to, going and copying the inventory of tapes, people drawing out tapes in a store, probably is not actionable now because of the *Sullivan* v. *New York Times,* if it involves a public figure.

Senator SIMPSON. Right.

Mr. BELL. A private person could bring suit for invasion of privacy. Those sort of things, though, would fall under what I call the right to be let alone, which might be a first cousin of a right to privacy.

Senator SIMPSON. Thank you.

The CHAIRMAN. Senator Leahy.

Senator LEAHY. Thank you very much. Mr. Chairman, I join with both you and Senator Simpson in denouncing this type of thing. It is nobody's business what Oliver North or Robert Bork or Griffin Bell or Pat Leahy watch on television or read or think about when they are home. I am concerned because in an era of interactive television cables, the growth of computer checking and check-out counters, of security systems and telephones, all lodged together in computers, it would be relatively easy at some point to give a profile of a person and tell what they buy in the store, what kind of food they like, what sort of television programs they watch, who are some of the people they telephone. And if they are in a place with a computer security system, you could even tell whether they came home late at night or did not even come home at all. I think that is wrong. I think that really is Big Brother, and I think it is something that we have to guard against.

I think that that is something that is not a conservative or a liberal or moderate issue. It is an issue that goes to the deepest yearnings of all Americans that we are here and we cherish our freedom and we want our freedom. We want to be left alone.

We have almost caricatures of that of Vermonters welcoming that privacy, but they welcome that in Georgia, I am sure, or Wyoming or Delaware. Those are the things that we have got to guard against.

I do not think that if we are going to look for people for public figures that they deserve that kind of scrutiny. They really do not. They deserve questions to be asked thoroughly and fully about their views about the job that they are going to go into, the public office that they are going to go into. That is really what is happening in this committee. I think there has been a thorough, extensive, intensive review, but I do not share the views of some that somehow we have now altered for all times who can even be picked to be a Supreme Court Justice.

The fact is we may have changed or enlarged the kind of scrutiny we use, but we should be doing that. For public office, it is legitimate scrutiny. Senator Hatch has said that there has been a great deal of lobbying here. Well, of course, there has—on both sides. In my 13 years in the Senate, I have never received so much mail and so many phone calls on any subject as I have on this one, and they have been heavily lobbied. I mean, we now weigh the preprinted postcards. Well, 49 pounds for, 110 pounds against; then the next day it is 110 pounds for, 49 against.

They even ran a cartoon in one of our local papers saying that I would not have to buy any firewood in Vermont this year; I would have plenty to burn and keep going for the rest of the winter. The only thing they are wrong in is I have got enough the go for the next three winters, no matter how cold it gets in Vermont.

But I would note this: Those lobbying efforts have gone beyond the pale with some on both sides. There were a lot of people geared up long before this thing even started to tell us either of what a danger or what a blessing Judge Bork was. I can speak for myself and I think for a lot of other Senators. We are not going to make up our mind based on what the lobbying groups tell us. We are going to make up our mind based on what we hear here.

That is why we have listened so carefully to people both for and against Judge Bork here. But I find very distasteful some of the tactics I have seen in lobbying, and I would assure the Senator from Utah that those tactics have not all been all used against Judge Bork. Some of the very distasteful ones have been used for him, and I do not associate Judge Bork with that at all. I think that he is way above that sort of thing.

Let me just ask you one question, Judge Bell. During the time when you were Attorney General, was Judge Bork on any one of your short lists for recommendation to any position, judicial or executive?

Mr. BELL. No. I never had a short list. You mean for the Supreme Court?

Senator LEAHY. Well, either the Supreme Court or any judgeship or any other position, say even in the Department of Justice?

Mr. BELL. I did not have a list of Supreme Court Justice possible nominees except in my head. The reason I did not——

Senator LEAHY. Was he on that list?

Mr. BELL. President Ford had a list, and it was over in the department. A lot of people seemed to know about it. I did not think that was a good thing.

Now, insofar as I know, he never came up on any of the Circuit Court Commission lists. I never saw his name. But having said that, I have never heard that he applied for circuit judgeship.

I was having dinner with him when we were working on this case here in Washington when he told me that he had been asked if he was interested in going on the court of appeals for the District of Columbia. And later on he told me he decided to go on the court of appeals. You know, he had been teaching or in the government most of his life, and I was frankly somewhat surprised he went on the court at the time because he was doing well in the law practice. But he wanted to do it, and that is what he did.

I never saw his name on any list that I had.

Senator LEAHY. Judge, when you testified in favor of Chief Justice Rehnquist, you said that the 1984 presidential election mandated his confirmation, and you said that the results of the 1984 election mandated Judge Bork's nomination.

Do you see the results of the 1986 election, which changed the control of the Senate, having any influence whatsoever?

Mr. BELL. Yes, I do. It had to give you a heavy responsibility in the confirmation process, but it cannot change the fact that the President, one that carried 49 states, is entitled to do the nomination.

Senator LEAHY. I understand, but could it also speak to the fact that the American people realize that the Senate is an equal partner in the confirmation process through the advise and consent clause?

Mr. BELL. No, I do not agree with that constitutionally. I do not think the Senate is an equal partner.

Senator LEAHY. You do not?

Mr. BELL. No.

Senator LEAHY. So we should just rubber stamp?

Mr. BELL. No. Oh, no. I do not think you are a partner at all. I think you have a separate responsibility to look at the nominee and either confirm or not confirm. But you are not a partner in the nominating process that the President would have to check with you. Sometimes people seem to think that the President ought to check out what he is going to do with the Congress before he does anything.

We do that in foreign intelligence, as you know, oftentimes, or foreign relations generally. But I do not think that works in the nominating process.

The CHAIRMAN. Your time is up, Senator.

Senator LEAHY. Thank you.

The CHAIRMAN. The Senator from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Bell, I would like to discuss with you for a few moments the subject of Judge Bork's testimony on saying that he would apply settled principles although he disagreed with them philosophically. It came up specifically in the context of Justice Holmes' clear and present danger test. We had gone through an analysis of the case, and it turned on the decision in *Brandenburg* v. *Ohio.* Judge Bork said that even though he maintained his philosophical disagreement, that he would apply the settled principle.

Do you think that it is realistic to apply a doctrine where a judge disagrees with the underlying philosophy?

Mr. BELL. Well, yes, I think it is practical, if you want to know that. I think judges do that fairly often. They vote to do something that they do not agree with, but they think the law requires it. And I will give you an example.

When I was on the Fifth Circuit Court of Appeals, the FBI found out that a group in Tallahassee, Florida, had decided to come to Jacksonville to obstruct justice. They were going to invade the courtroom to put, as they said, "the judges in fear." They did. And we were prepared. We had people there to keep order, and we went on with the hearing after some disturbance.

But at that time, the Justice Department wanted to prosecute these people for obstructing justice. They came to see me, and I said, "You should not do that. They did not obstruct justice, number one, and number two, that is a form of speech that they were engaged in, plus action, in this very close case, and I would not do that."

Now, I would have liked to have sent them all to the penitentiary if I could, but under the system you cannot do that. And I think that a lot of times judges rule on things that they are—and they stick with precedents that they do not agree with.

Senator SPECTER. Judge Bell, it came into pretty sharp focus on the follow-up question, which I had intended to include in the first question, but I was interested in your view just on the abstract principle.

I then asked Judge Bork about the follow-up case of *Hess* v. *Indiana,* and without getting too deeply involved in the specific facts of the case, I said, "Well, then, we can expect you to apply the settled law clear and present danger, as expressed in *Brandenburg* and *Hess.*" And Judge Bork said, "No, I do not go for the *Hess* case."

I said, "Well, why not?" He said, "Well, the *Hess* case is an obscenity case." In that case, the man in the street in the college demonstration, expletive deleted, said, "We are going to keep the things free."

The concern that I have is here you have Judge Bork saying that he disagrees with the clear and present danger test. You have him saying that he does not like *Brandenburg* but he will apply it philosophically.

The very next case that comes along is *Hess* v. *Indiana,* just 4 years later. This is a case where Judge Bork has written that it is a clear and present danger case; this is a case where the Supreme Court analyzes the freedom of speech rule in terms of clear and present danger, and not in an obscenity case. There is a three-man concurrence also on the clear and present danger issue. But the very next case that comes up, Judge Bork disagrees with its being a clear and present danger issue but moves over to an obscenity issue and does not commit to follow it.

That is a considerable concern that I have, given the fact that these cases are all different on the facts, and where you have him having expressed himself in such very forceful language against the Holmes clear and present danger test. And he says he will accept it as settled law, but the very next case that comes up, he does not see it as a clear and present danger case. He sees it as an obscenity case.

That gives me considerable pause, and I would like your observation on that.

Mr. BELL. Well, I am not familiar with the *Hess* case, but that would bother me if somebody said they would do something and then they immediately figure a way to get around it.

Senator SPECTER. That is the concern I have, precisely stated.

Mr. BELL. I do not think you could make an obscenity case out of the facts as you stated them. I mean, I do not think that could be seriously argued that that was an obscenity case. It is a speech case.

Senator SPECTER. Well, the Supreme Court said it was a speech case, and Judge Bork had in some prior writings. That is why I have a trouble as to the next case that comes along on applying the constitutional principle, if there is a deep seated philosophical disagreement.

Mr. BELL. I thought he had said that he now would follow the *Brandenburg* case.

Senator SPECTER. He did but then he distinguished the *Hess* case as an obscenity case.

Is my time up, Mr. Chairman?

The CHAIRMAN. Yes, it is.

Senator SPECTER. Thank you very much, Judge Bell.

The CHAIRMAN. Senator Humphrey.

Senator HEFLIN. What about me?

The CHAIRMAN. I am sorry. I beg your pardon. Senator Heflin. I am sorry.

Mr. BELL. It is hard to see Senator Heflin.

The CHAIRMAN. I never have any trouble seeing Senator Heflin. A man of his keen intellect is hard to not see.

Senator HEFLIN. Intellect has not got anything to do with size. [Laughter.]

Judge Bell, we are delighted to see you.

The CHAIRMAN. Would you mind taking off your sheath there.

Senator HEFLIN. They can hear me back in Alabama without it.

We are delighted to see you. I believe last time you were up here on some confirmation they got on you a little bit. I had to defend you some.

Mr. BELL. You did, yes.

Senator HEFLIN. I do not remember exactly what it was.

Mr. BELL. I was worried about coming up here today, to tell you the truth. I was hoping to have some defenders.

Senator HEFLIN. They are pretty nice to you.

I think sometimes people do not realize your service to this country as a member of the United States Court of Appeals for the Fifth Circuit during the days where you had some right troubled times. I believe you said that you were one time the superintendent of schools for the State of Mississippi. What was that statement?

Mr. **Bell**. I had 32 school districts when I was administering the school system in a segregation case. The people in Mississippi called me the school superintendent of Mississippi. I was not calling myself that.

Senator **Heflin**. Well, you know, you say you are now a moderate conservative. You were one of them wild-eyed liberals back then. In fact, as I remember, you were on the list for the barbed wire treatment, were you not?

Mr. **Bell**. Yes, I always wished my mother and father had been living when I was in the confirmation process for Attorney General where I was made out to be an ultra conservative. They went to their graves thinking I was an ultra liberal of some sort.

Senator **Heflin**. You sort of changed it a little bit. You said moderate conservative. They tell me you have become a lot more conservative since you became rich. [Laughter.]

In fact, I keep hearing if you could make another 10 million that you may be a Republican before it is over. [Laughter.]

Mr. **Bell**. I do not know about that.

Senator **Heflin**. We are delighted to see you. I tell you, this confirmation process has been an interesting one. That 15 percent on the right and the 15 percent on the left I believe has got a little crowded. We have had a great deal of phone calls and letters, as well as people seeing us on this matter.

Mr. **Bell**. They have got more than 15 percent of the noisemaking capacity.

Senator **Heflin**. Well, I think that is probably correct.

You said you do not think that Judge Bork would attempt to turn back the clock on any of the progress that has been made through decisions of the U.S. Supreme Court in race relations in the South. This, of course, is a concern to me. We certainly do not want to have to go back and relive some of the strife that occurred in some of the days of anxiety that we went through. I think that I am fair in stating that conservatives, liberals, Republicans, Democrats—nobody wants to go back into that.

Why are you convinced that he would not, in effect, change any of the decisions? I am interested in your opinion on that.

Mr. **Bell**. Based on my knowing him, I consider him to be a very sensitive person to other people and to history. And it would take almost a barbaric person to come out and say and even try and turn back the clock on civil rights.

If I thought he was going to turn the clock back on civil rights, I would not support him. I will tell you that. I have spent a lot of years of my life in that field of endeavor, and we do have things in pretty good shape now. There are still problems, of course, and there always will be in a country like ours where we have a lot of diverse people.

But I have never heard him say anything that would indicate to me or see anything he has written that he would do anything against civil rights. Therefore, I do not expect that he would.

I would be shocked if he did anything except vindicate civil rights of people. On race now, you are talking about race. I am talking about race. Now, when we get over to the civil rights of women, that is a little different. I think that he would apply the 14th amendment, the equal protection clause to women, as would I.

The 19th amendment changed our history. As I said earlier today, the whole attitude in the free world toward women changed. I would expect that his attitude would be fine on women.

Now, I have not listened to the whole hearing, and I understand they got some debate started over how he would apply the equal protection standard as to women, which we will have to address separately. I understand he has the same view that Justice Stevens has. Unless there is a reasonable basis for denying the equal protection, you could not deny. But in race, you could not deny it at all. There would not be any way that anyone could think of to make any exception based on race.

He said that on women he thought maybe a distinction based on combat, military combat, would be a valid distinction and I think restrooms. That is all I read he said, but I did not hear his testimony.

I am satisfied, and I told Mayor Young, that he would not do anything against the rights of blacks. Now, you have not asked me, but he has been into the busing question and the affirmative action question. As you know, those are not constitutional rights. They are remedies that were fashioned to relieve and overcome the product of discrimination. Bussing has not worked out well. Most judges thought that it would not work out well, but they have tried. They were trying to do something to integrate the schools. The other thing, affirmative action was—we got that for the same reason, and it runs to women as well as to blacks. That will be in use so long—until we are in balance, until we get where everyone has their rights, the discrimination has been eradicated.

So those things are important, but I would strongly imagine that if he was faced with fashioning a remedy, say the *Alabama* case where the State patrol was ordered to hire a certain number of black troopers, some percentage—the Supreme Court upheld that—I do not know how he would rule on that, but, certainly, I would not have any trouble with that.

The thing we have to keep in mind, though, is that this affirmative action, and bussing, all those things do finally come to an end. They are remedies. Remedies.

The CHAIRMAN. The Senator from New Hampshire.

Senator HUMPHREY. Thank you, Mr. Chairman.

Judge Bell, just to review your credentials, you are a Democrat still.

Mr. BELL. Still?

Senator HUMPHREY. Are you not?

Mr. BELL. I do not have any plans to change.

Senator HUMPHREY. You served as a district court judge, or was it circuit court of appeals judge?

Mr. BELL. I may be put out. That is the only problem I am having.

Senator HUMPHREY. At which level of the federal judiciary did you serve as judge?

Mr. BELL. Court of appeals.

Senator HUMPHREY. Court of appeals.

Mr. BELL. What was then the fifth circuit. It is now fifth and eleventh circuits. What now is one big circuit.

Senator **Humphrey**. Second highest level in the judiciary. And you served for 15 years, no——

Mr. **Bell**. Fourteen and a half.

Senator **Humphrey** [continuing]. Small chunk of a person's life. And you served during some very turbulent years. As we heard from Senator Heflin, you were referred to by some people in Mississippi, at least, as the school superintendent for the State of Mississippi, even though in fact you were a federal judge.

So it sounds as though—although I do not know the details—it sounds as though you certainly did not spare the judicial rod in the discharge of your responsibilities to uphold the equal rights of citizens.

While you were Attorney General, Mr. Bell, the top man in the United States Justice Department, how many judges would you say—this of course was in the administration of President Jimmy Carter.

How many judges would you say your Department recommended that the President nominate to the bench?

Mr. **Bell**. Well, we recommended over 200.

Senator **Humphrey**. Over 200.

Mr. **Bell**. I think it was, as best as I can remember, 222, 224. We recommended more than that, but the President did not appoint every one we recommended. I think two or three times he appointed someone else, but generally he did.

Senator **Humphrey**. Almost all the time the President followed your recommendations.

Well, in the examination of possible nominees to the federal bench, was your evaluation of their civil-rights credentials cursory? Was it substantial? Did you give it a great deal of scrutiny?

How much importance did you give to that in the screening process?

Mr. **Bell**. I gave a great deal. I put in a new system where I had the National Bar Association, which is mainly black lawyers—I let them in the process just like the American Bar Association, and asked them to give their opinion on each candidate, as to whether they thought they were biased. And that was a help. So we paid a lot of attention to that. We did not want any biased judges on the bench.

Senator **Humphrey**. Yes. So you gave it a great deal of weight in the process?

Mr. **Bell**. Oh, yes, and one of the things the American Bar was supposed to look at, but the black bar actually was closer to the situation.

Senator **Humphrey**. Have you any less confidence in the ability, and likelihood of Robert Bork to uphold equal rights for all citizens when he is confirmed, than you had in the nominees which you recommended to the President?

Mr. **Bell**. I do not, and I have not heard anyone say that he would be biased.

Senator **Humphrey**. Well, it has been implied.

Mr. **Bell**. I have not seen any of the reports——

Senator **Humphrey**. Take my word for it. You can take our word for it. In fact it has been more than implied, and I am going to get to that in just a minute.

Mr. Bell. I have not seen an FBI file, for example. I read every FBI file on the judges that were processed when I was Attorney General. I have not read his FBI file, but I do not know of any reason to believe—I do not have a reason to believe he is biased.

Senator Humphrey. Well, one U.S. Senator said, in this room—and it is too bad the Senators do not have to take the oath as do witnesses—but one U.S. Senator said on this subject that, "In Robert Bork's America, black citizens would have to sit at segregated lunch counters."

Now that is the kind of rhetoric, not only from these special-interest groups, but from Senators of the United States, which I think is reprehensible.

Mr. Bell. I am not trying to defend the Senator that said that, but at the time of the public-accommodations law, I think Judge Bork said that he was opposed to the public-accommodations law, so I assume that is what the Senator had reference to.

Senator Humphrey. Well, do you think that was a responsible charge to make, that blacks would have to sit in segregated lunch counters?

Mr. Bell. Well, I do not think that would be so now. I do not think that Judge Bork even believes that now, but at that time, a lot of people in this country—as I said earlier, a lot of lawyers thought that the law was unconstitutional. There had never been a case where we had found that just buying a bottle of vanilla flavoring in interstate commerce was enough to put a whole restaurant under interstate commerce.

But the commerce clause was what the public-accommodations law was based on, not the equal protection clause or the 14th amendment, and a lot of people had doubt about it at the time, but the Supreme Court upheld it and that was the end of that.

Senator Humphrey. I am simply trying to make the point that in fact the charge of racism has been raised in almost explicit terms, even in this room. We heard that statement from a Senator saying blacks would have to sit at segregated lunch counters.

The same Senator said that rogue police would be breaking down our doors in the middle of the night.

Mr. Bell. Well, I tell you, I am going to leave that sort of rhetoric to be settled amongst the Senate.

Senator Humphrey. I was hoping I could get you——

Mr. Bell. Keep out of it myself. I learned long ago not to get in somebody else's fight.

Senator Humphrey. Well, you do not mind my extending an invitation, do you? [Laughter.]

Well, let's talk about some of these advertisements by these special-interest groups.

The Chairman. Senator, your time is up, but since you did not take time in the first round, take a little more, but please try to——

Senator Humphrey. Thank you. That pleases me very much. Thank you. But I will not be greedy about it.

Another impression that has been created is that Judge Bork would put a federal television camera in everyone's bedroom.

I tell you, the kinds of charges and innuendo, and lies, as Attorney General William French Smith branded them—accurately—

that have been raised in connection with this hearing, are certainly the worst I have seen and hope ever to see in my entire life. I think it is disgraceful.

You know, it is really odd, and, in a way, very revealing, is that notwithstanding the fact that nearly a third of the Supreme Court's calendar, docket, is comprised of criminal law cases, we have hardly had a peep on that subject in this room.

It has all been racism, sexism, extremism, turning back the clock-ism—all of this rubbish.

Mr. **Bell**. Don't you think that is because most people are now in agreement that—on law and order questions, that we do need to have law and order in our country?

Senator **Humphrey**. But nonetheless, in filling a Supreme Court vacancy, it is important that we have a nominee who will take a reasonable approach in dealing with criminal law cases, such that not only are the legitimate rights of the accused—by the time they get to the court they are criminals I guess—not only would it protect the legitimate right of criminals in the process, but also, that judges insure that they sustain enough balance so that the rights of innocent citizens to the security of their persons and their property are upheld as well.

Are you at all concerned on this score?

Mr. **Bell**. Well——

Senator **Humphrey**. Do you think courts have gone too far in protecting criminals?

Mr. **Bell**. What is that?

Senator **Humphrey**. Do you think courts have gone too far in protecting criminals, in the sense that they have reduced the legitimate protection which innocent citizens are entitled to?

Mr. **Bell**. Well, I am not in favor of overruling *Miranda*.

Senator **Humphrey**. I did not ask that.

Mr. **Bell**. No. But I do favor the change that has been made in the exclusionary rule, where they came out with the good-faith exception. I think that was a step in the right direction.

Senator **Humphrey**. Yes.

Mr. **Bell**. I think before that, a lot of criminals were getting off on technicalities, and that was upsetting the American people no end.

Senator **Humphrey**. And they are still upset about it.

Mr. **Bell**. I would like to say about the general question that you are on: I believe that the four Justices that the people keep saying that Justice Bork would join, and turn back the clock, I think they are in need of counsel. They need somebody to represent them. And I think that they are talking about Justice White, and Justice O'Connor. I imagine they wonder every day what clock are they getting ready to turn back? They never turn back a clock.

Scalia and the Chief Justice, I guess they are classified as full conservatives, but it is amazing that these four people are supposed to vote as a block, and we have got another person we are getting ready to send over there to join this block.

Now that is not the way courts operate. Every judge is a law unto himself in a way. I mean, they do not want anybody to tell them how to vote, and you just do not get in blocks, and you get very offended is somebody comes around and lobbies you even.

So I think that that is something that seems to be overlooked in the hearing, that these four judges are not getting anybody to defend them, so I would like to say a word on their behalf.

Senator HUMPHREY. Thank you very much.

The CHAIRMAN. Your time is up, Senator. Senator, I want to give you a chance to clarify the record.

I am sure you did not mean what you said when you said that they are "criminals by the time they get to the court." You meant by the time they get to the Supreme Court, right?

Senator HUMPHREY. I was not talking about the judges.

The CHAIRMAN. No, no. You were talking about the accused.

Senator HUMPHREY. I was talking about——

[Laughter.]

The CHAIRMAN. No, no. I am being very serious, because a number of us, when you said the "accused are criminals by the time they get to the court."

Senator HUMPHREY. Yes. I understand that decisions can be overturned at the Supreme Court. Therefore, the last word has not been heard.

The CHAIRMAN. All right.

Mr. BELL. I would like to say that that colloquy is lost on me.

The CHAIRMAN. It is lost on me, also. I am sorry. Let the record stand as it was stated.

Judge, thank you very much for being here. We truly appreciate it.

Senator THURMOND. Thank you very much, Judge, for appearing.

The CHAIRMAN. Now let me tell my colleagues on the committee the plans of the committee. We are going to take one more witness before lunch.

Professor Philip Kurland. If you will come forward, Professor, while I indicate what the rest of the day will be.

We have three more panels, all testifying on behalf of Judge Bork, panels made up of five, six, and three people, respectively, and one individual who will be testifying against Judge Bork this afternoon.

I would like my colleagues to consider whether or not we would be willing to run right through lunch, but that is up to them, to make that judgment. We will think about that.

If not, we will take a break immediately after Professor Kurland testifies, but I would like to finish this list today.

And also suggest to my colleagues, we are going to have to consider—it is obvious to me we are not going to be able to get to a mark-up by Thursday, as we had hoped.

I would like them to begin to consider whether or not next Tuesday or the following Thursday is best suited for that purpose. We will make no decision at this moment. Not Friday, I can assure you that. It will either be next Tuesday or next Thursday, and we can discuss that later.

Let me swear you in, Professor.

Do you swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. KURLAND. I do.

TESTIMONY OF PHILIP B. KURLAND

The **Chairman**. Thank you and welcome. Our witness is Philip B. Kurland, the William R. Kenan Distinguished Service Professor at the University of Chicago.

It is a pleasure to welcome such a very distinguished scholar and witness, among the leading constitutional scholars of our time, to testify before this Committee today.

Professor, do you have an opening statement?

Mr. **Kurland**. I do.

The **Chairman**. Would you please proceed.

Mr. **Kurland**. And I have submitted it to the committee.

The **Chairman**. It will be entered in the record in its entirety, and to the degree to which you can summarize, it would be appreciated.

Mr. **Kurland**. I want to say I have known Robert Bork for many years. I have worked with him. Some of his closest friends have been some of my closest friends.

Had I been called here as a character witness, I should gladly tell you of his impeccable character. That is not my role.

I am here today to tell you why I think his appointment to the Supreme Court would not be good for the Court, for the nation, or for the Constitution.

Because so much nonsense has been spoken and published suggesting a rubber-stamp function for the Senate, provided only that a nominee has demonstrated legal talents and an absence of criminal convictions, I would offer you a quotation from Senator Strom Thurmond at the Fortas hearings, where he described, appropriately, the role to be performed here.

He said, and I am quoting: "To contend that we must merely satisfy ourselves that Justice Fortas is a good lawyer, and a man of good character, is to hold a very narrow view of the role of the Senate, a view which neither the Constitution itself, nor history and precedent have prescribed."

"It is my opinion, further, that if the Senate will turn down this nomination, we will thus indicate to the President, and future Presidents, that we recognize our responsibility as Senators. After all, this is a dual responsibility. The President merely picks, or selects, or chooses the individual for a position of this kind, and the Senate has the responsibility of probing into and determining whether or not he is a properly qualified person to fill the particular position under consideration at the time."

Senator **Thurmond**. That is a pretty sound statement, isn't it?

Mr. **Kurland**. I agree with it wholeheartedly, Senator.

Second, I would just like to suggest, as concisely as I can, some of the reasons why I think you should deny your consent to the nomination pending before you.

First, at least since his most recent return to Washington, Judge Bork has purported to espouse the notion that constitutional decisions not based solely on the text, and the so-called intent of the authors, are invalid.

The fact is that original intent is not a jurisprudential theory, but, like Nixon's "strict construction," and Roosevelt's "back to the Constitution," it is merely a slogan to excuse replacing existing Supreme Court judgments with those closer to the personal predilections of their expounders.

Indeed, I have it on the highest authority that history is an inadequate guide to the resolution of constitutional controversies before the Court.

Let me quote the words of a constitutional scholar of some distinction, Professor Robert Bork, writing in 1968.

He said: "The text of the Constitution, as anyone experienced in words might expect, is least precise where it is most important. Like the Ten Commandments, the Constitution enshrines profound values, but necessarily omits the minor premises required to apply them. The First Amendment is a prime example."

"To apply the Amendment," he said, "a judge must bring to the text principles, judgments, and intuitions not to be found in bare words."

He went on: "When we turn to the equal protection clause of the 14th amendment, we know the clause was meant to be important, but the words tell the judge very little. History can be of considerable help, but it tells us much too little about the specific intentions of the men who framed, adopted and ratified the great clauses. The record is incomplete. The men involved often had vague, or even conflicting intentions, and no one foresaw, or could have foreseen the disputes that changing social conditions, and outlooks would bring before the Court."

This view of the limited use of history, announced here by Judge Bork, was shared by the famed jurists who bore the label of "judicial restraint," including the three leaders of the school—Holmes, Frankfurter, and perhaps the greatest of them all, Judge Learned Hand.

My expectation that Judge Bork would find little barrier—it is that Judge Bork would find little barrier in *stare decisis* to a widespread judicial revision of erroneous decisions—derives from his own statements, and writings.

Of course Judge Bork could not singlehandedly overturn the large number of cases that his contemporary rhetoric threatens.

But Judge Bork would not be the first Reagan appointee. He would be the fourth. It is true that Judge Bork once said before this body, "A judge ought not to overturn prior decisions unless he is absolutely clear that that prior decision was wrong, and perhaps pernicious."

Unfortunately, like Koko in "The Mikado," Judge Bork has a little list, or perhaps not such a little list, of cases which he has anathematized. "Nobody believes," he told the Senate, "the Constitution allows, much less demands, the decision in *Roe* v. *Wade* or in dozens of other cases in recent years."

Certainly, that was hyperbole, but not less revealing for it. And he did tell this body at one time that the cure for erroneous constitutional judgments is to be had through the appointment process.

A quick currying of just some of his recent writings and speeches reveals a long list of cases damned by Judge Bork as wanting support in the Constitution or its original context and, therefore, eligible for obliteration whenever five votes can be garnered on the Supreme Court. A sampling includes the reapportionment cases, the privacy cases, *Shelley* v. *Kraemer* making racially restrictive covenants unenforceable, *Katzenbach* v. *Morgan* suggesting a congressional power to add to the rights protected by the 14th amendment, *Skinner* v. *Oklahoma* invalidating a law providing for involuntary sterilization of criminals, *Engel* v. *Vitale* banning prayer in public schools, *Aguilar* v. *Felton* banning public financing of religious schools, *Bakke* v. *Board of Regents* sustained affirmative action. The list goes on and on.

In addition to these, I should say there is the principal thrust of Attorney General Meese's original intent thesis, a thesis that Judge Bork seems to have espoused, that the Bill of Rights is not properly applicable to State actions. There would be an almost wholesale license to the States to avoid the restraints of all of the first eight amendments.

Third, not only does Judge Bork's judicial philosophy bode ill for past decisions in the Supreme Court, it also reveals an unwillingness to recognize that the principal objective of the framers of our Constitution 200 years ago was the preservation and advancement of individual liberty. Liberty was, indeed, the watchword of the national convention and of the State ratifying conventions as well.

The Constitution did not create individual rights. The people brought them to the convention with them and left the convention with them, some enhanced by constitutional guarantees. The Bill of Rights, in guaranteeing some more, made sure that none was adversely affected.

Judge Bork, however, would now limit the rights of the individual to those specifically stated in the document, thereby rejecting his claim to be a textualist by ignoring the ninth amendment which provides, and I quote, "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Again, I have it on the highest authority that Judge Bork's current restricted view of the people's rights is wrong. Again, I quote to you from Professor Robert Bork, who told us, "A desire for some legitimate form of judicial activism is inherent in a tradition that can be called Madisonian. We continue to believe that there are some things no majority should be allowed to do to us, no matter how democratically it may decide to do them. A Madisonian system assumed that in wide areas of life a legislative majority is entitled to rule for no better reason than that it is a majority. But it also assumes that there are some aspects of life a majority should not control, that coercion in such matters is tyranny, a violation of the individual's rights. Clearly, the definition of natural rights cannot be left to either the majority or the minority. In the popular understanding upon which the Supreme Court's power rests, it is precisely the function of the Court to resolve the dilemma by giving content to the concept of natural rights in case-by-case interpretation of the Constitution. This requires the Court to have and to demonstrate the validity of a theory of natural rights."

Professor Bork went on with encomia over Mr. Justice Goldberg's rationale for *Griswold* v. *Connecticut,* the case for which he can now find no excuse and which he now regards as anathema. I am continuing the quote from Professor Bork. "Legitimate activism requires, first of all, a warrant for the Court to move beyond the range of substantive rights that can be derived from the traditional sources of constitutional law. The case for locating this warrant in the long-ignored ninth amendment was persuasively made by Justice Arthur Goldberg. . . . This seems to mean that the Bill of Rights is an incomplete, open-ended document, and that the work of completion is, at least in major part, a task for the Supreme Court. There is some historical evidence that this is substantially what Madison intended."

Bork's current constitutional jurisprudence, however, is essentially directed to a diminution of minority and individual rights. Thus, in his recent Boyer Lecture before the American Enterprise Institute, he sneered at the view that "individuals are entitled to their moral beliefs," because, he said, "the result of discounting moral harm is the privatization of morality, which requires the law of the community to practice moral relativism." For him constitutional freedom belongs not to the individual but to the State. Indeed, to quote him from the same source, "the major freedom of our kind of society is the freedom to have a public morality."

Once again, I would invoke the argument of Professor Bork in refutation of the argument of Judge Bork. "Moral disapproval alone," he once wrote, "cannot be accepted as a sufficient rationale for any coercion. If it were, there would be no limit to the reach of the majority's power, and that contradicts the basic postulate of the Madisonian system."

I submit that, as Judge Learned Hand once told us, the Constitution cannot survive unless sustained by the "spirit of liberty" which gave it birth. I would close, then, by quoting Judge Learned Hand's notion of the spirit of liberty, a spirit which is totally absent from Judge Bork's constitutional jurisprudence. Judge Hand said, in 1944, in the midst of the war we were then waging against the forces of darkness: "The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty"—I lost my place. I may never get back to it.

The CHAIRMAN. Take your time.

Mr. KURLAND [continuing]. "Is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who, near 2,000 years ago, taught mankind the lesson that it has never learned, but has never quite forgotten, that there may be a kingdom where the least shall be heard and considered side by side with the greatest."

Thank you, Mr. Chairman.

[Prepared statement follows:]

I

TESTIMONY OF PHILIP B. KURLAND BEFORE THE JUDICIARY COMMITTEE OF THE UNITED STATES SENATE AT HEARINGS ON THE NOMINATION OF ROBERT HERON BORK TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES ON 17 SEPTEMBER 1987

Mr. Chairman:

My name is Philip B. Kurland. I am the William R. Kenan Distinguished Service Professor at The University of Chicago. I have taught in and around constitutional law since 1950, before which I served as law clerk to Judge Jerome N. Frank and then to Justice Felix Frankfurter. For seven years, I served this Committee as Chief Consultant to Senator Sam J. Ervin, Jr. in his position as Chairman of the Subcommittee on Separation of Powers.

I have known Robert Bork for many years. I have worked with him. Some of his closest friends have been some of my closest friends. Had I been called here as a character witness, I should gladly tell you of his impeccable character. That is not my role. I am here to tell you why I think his appointment to the Supreme Court would not be good for the Court, for the nation, or for the Constitution.

First, I would suggest that the function of this Committee is to estimate, on the bases of his record, what a Supreme Court nominee's judicial philosophy is and then to decide whether on the basis of that estimate the candidate is right for the job. The responsibility for that decision is yours; it is an awesome responsibility. In exercising the advise and consent power, you are agents neither for an administration nor for a party. Yours is rather a fiduciary responsibility to the American people and to the Constitution which you have sworn to uphold.

Because so much nonsense has been spoken and published suggesting a rubber stamp function for the Senate provided only that a nominee has demonstrated legal talents and an absence of criminal convictions, I would offer you a quotation from the most astute student of the Supreme Court in modern times, written over fifty years ago and so untainted by the partisan debate that threatens to mire these hearings. In 1930, Professor Felix Frankfurter wrote:

Senate opposition to nominations for the Supreme Bench is no novelty in American history. The Senate has always acted upon the constitutional requirement that the President "shall appoint . . . judges of the Supreme Court" but only "by and with the advice and consent of the Senate." Participation by the Senate in appointments to the Court has been especially active in regard to filling the Chief Justiceship. . . . The Associate Justices have similarly had to meet the Senate's constitutional duty of approval. Not a few nominations have been actually rejected.

Seldom, indeed, have nominations for the Court been opposed on the score of personal disqualification. Fundamentally, the objections have been political. They have concerned the general outlook of nominees upon the public issues that in different periods of the Court's history were likely to come before the Court. By the very nature of its place in the American scheme of government the Supreme Court is in the stream of public affairs, and its decisions thus have entangled the Court in political controversy. . . .

Unless the President, the Senate, and the country are alert to the qualities that Justices of the Supreme Court ought to possess and insist upon suitable appointees, no mechanics will save us from the evils of narrow prepossessions by members of the Court. Contrariwise, if we are fully alive to the indispensible qualifications for the high work of the Court, and insistent upon measuring appointees accordingly, mechanical devises are superfluous and obstructive. It is because the Supreme Court wields the power that it wields, that appointment to the Court is a matter of public concern and not merely a question for the profession. In good truth, the Supreme Court is the Constitution. Therefore, the most relevant things about an appointee are his breadth of vision, his imagination, his capacity for disinterested judgment, his power to discover and suppress his prejudices. Judges must learn to transcend their own convictions . . . Therefore it is that the men who are given this ultimate authority over legislature and executive, whose vote may determine the well-being of millions and affect the country's future, should be subject to the most vigorous scrutiny before being given that power. . . . The country's well-being depends upon a far sighted and statesmanlike Court.

There is irony in the fact that at the moment of the bicentennial celebration of the Constitution, we are asked to overlook the concern, stated in the Declaration of Independence and iterated again and again in the national and state conventions that produced the Constitution, for a judicial branch totally independent of the executive. Executive control of the judiciary, judges who could be expected to serve the will of the executive, was a form of tyranny that the Framers clearly intended to expunge.

Whatever the role of the White House staff, a clearly extraconstitutional governmental force, and the Department of Justice, the members of the Supreme Court were never intended to be numbered among "The President's Men."

II

Second, I should like to suggest, as concisely as I can, some of the reasons why I think you should deny your consent to the nomination pending before you.

1. I think that Robert Bork's appointment would substantially help to effect the constitutional revolution that has been part of the

Reagan platform since he entered office. Indeed, it is on the commitment to such special interest groups as Reverend Falwell's, the Right to Life Movement, the Eagle Forum of Illinois, the Dolphin Society of California, the Federalist Society, and organizations of police and prosecutors, to name just a few, that the Bork nomination was predicated. The claim that Bork is a middle-of-the-road jurist in the tradition of Felix Frankfurter, John Marshall Harlan, and Lewis Powell was an afterthought and without much, if any, basis in fact.

2. At least since his most recent return to Washington, Bork has purported to espouse the notion that constitutional decisions not based solely on the text and the so-called "intent" of the authors are invalid. The fact is that "original intent" is not a jurisprudential theory but, like Nixon's "strict construction," and Roosevelt's "back to the Constitution" it is merely a slogan to excuse replacing existing Supreme Cou judgments with those closer to the personal predilections of their propounders. Indeed, I have it on the highest authority that history is an

inadequate guide to the resolution of constitutional controversies before the Court.

Let me quote the words of a constitutional scholar of some distinction, Professor Robert Bork, writing in 1968:

> The text of the Constitution, as anyone experienced with words might expect, is least precise where it is most important. Like the Ten Commandments, the Constitution enshrines profound values, but necessarily omits the minor premises required to apply them. The First Amendment is a prime example. . . . To apply the amendment, a judge must bring to the text principles, judgments, and intuitions not to be found in bare words.
>
> When we turn to the equal-protection clause of the Fourteenth Amendment . . . we know the clause was meant to be important, [but] the words tell the judge very little.
>
> History can be of considerable help, but it tells us much too little about the specific intentions of the men who framed, adopted, and ratified the great clauses. The record is

> incomplete, the men involved often had vague or even conflicting intentions, and no one foresaw or could have foreseen, the disputes that changing social conditions and outlooks would bring before the Court. . . .

This view of the limited use of history announced here by Bork was shared by most of the famed jurists who bore the label of "judicial restraint," including the three leaders of the school: Holmes, Frankfurter, and, perhaps the greatest of them all, Judge Learned Hand.

3. That Bork would find little barrier in stare decisis to a widespread judicial revisionism of "erroneous" decisions derives from his own statements and writings. Of course, Bork could not single-handedly overturn the large number of cases that his contemporary rhetoric threatens. But Bork would not be the first Reagan appointee, he would be the fourth. It is true that Bork said, before this Committee, I think: "a judge ought not to overturn prior decisions unless he is absolutely clear that that prior decision was wrong and perhaps pernicious." Unfortunately, like Koko in The Mikado, Bork has "a little list" or not so little a list of cases which he has anathematized. "Nobody believes," he told the Senate,

"the Constitution allows much less demands, the decision in Roe v. Wade, or in dozens of other cases in recent years." Certainly that was hyperbole but not less revealing for it. Indeed, he told this body, that the cure for erroneous constitutional judgments is to be had through the appointment process.

A quick currying of just some of his writings and speeches reveals a long list of cases damned by Judge Bork as wanting support in the Constitution or its original context and therefore eligible for obliteration whenever five votes can be garnered on the Supreme Court. A sampling includes the reapportionment cases; the privacy cases; Shelley v. Kraemer, making racial restrictive covenants unenforceable; Katzenbach v. Morgan, suggesting a congressional power to add to the rights protected by the Fourteenth Amendment; Skinner v. Oklahoma, invalidating a law providing for involuntary sterilization of criminals; Engel v. Vitale, banning prayer in public schools; Aguilar v. Felton, banning public financing of religious schools; Bakke v. Board of Regents, sustaining "affirmative action." It goes on. The list, indeed, is not short.

Then there is the principal thrust of Attorney General Meese's original intent thesis, a thesis that Bork seems to have adopted, that the Bill of Rights is not properly applied to State action. That would be an almost wholesale license to the States to avoid the restraints of all of the first Eight Amendments.

4. Not only does Judge Bork's judicial philosophy bode ill for past decisions of the Supreme Court, it also reveals an unwillingness to recognize that the principal objective of the framers of our Constitution two hundred years ago was the preservation and advancement of individual liberty. Liberty was indeed the watchword of the national convention and of the state ratifying conventions as well. The Constitution did not create individual rights; the people brought them to the Convention with them and left the Convention with them, some enhanced by constitutional guarantees. The Bill of Rights in guaranteeing more, made sure that none was adversely affected. Judge Bork however would now limit the rights of the individual to those specifically stated in the document, thereby rejecting his claim to'be a textualist by ignoring the Ninth Amendment which provides: "The enumeration in the Constitution of certain

rights, shall not be construed to deny or disparge others retained by the people."

Again, I have it on the highest authority that Bork's current restricted view of the people's rights is wrong. Again I quote to you from Professor Robert Bork who told us:

> A desire for some legitimate form of judicial activism is inherent in a tradition that can be called "Madisonian." We continue to believe that there are some things no majority should be allowed to do to us, no matter how democratically it may decide to do them. A Madisonian system assumed that in wide areas of life, a legislative majority is entitled to rule for no better reason than that it is a majority. But it also assumes that there are some aspects of life a majority should not control, that coercion in such matters is tyranny, a violation of the individual's rights. Clearly the definition of natural rights cannot be left to either the majority or the minority. In the popular understanding upon which the power of the Supreme Court rests, it is precisely the function of the court to resolve the dilemma by giving content to the concept of natural rights in case-by-case interpretation of

> the Constitution. This requires the court to have, and to demonstrate the validity of, a theory of natural rights. . . .

He went on with encomia for Mr. Justice Goldberg's rationale for Griswold v. Connecticut, a case he now regards as anathema:

> Legitimate activism requires, first of all, a warrant for the court to move beyond the range of substantive rights that can be derived from the traditional sources of constitutional law. The case for locating this warrant in the long-ignored 9th Amendment was persuasively made by Justice Arthur Goldberg. . . . This seems to mean that the Bill of Rights is an incomplete, open-ended document, and that the work of completion is, at least in major part, a task for the Supreme Court. There is some historical evidence that this is substantially what Madison intended.

Bork's current constitutional jurisprudence, however, is essentially directed to a diminution of minority and individual rights. Thus, in his recent Boyer Lecture before the American Enterprise Institute, he sneered at the view that "individuals are entitled to their moral beliefs," because he said, "the result of discounting moral harm is the privatization of morality, which requires the law of the community to practice moral relativism." For him constitutional freedom belongs not to the individual but to the state. Indeed, to quote him, "the major freedom of our kind of society is the freedom to have a public morality." A public morality created by a moral majority.

Once again, I would invoke the argument of Professor Bork in refutation of the argument of Judge Bork. "Moral disapproval alone," he once wrote, "cannot be accepted as a sufficient rationale for any coercion. If it were, there would be no limit to the reach of the majority's power, and that contradicts the basic postulate of the Madisonian system."

I submit that, as Judge Learned Hand has told us, the Constitution cannot survive unless sustained by "the spirit of liberty" which gave it birth. I would close then by quoting Learned Hand's notion of the spirit of liberty, a spirit which is totally absent from Judge Bork's constitutional jurisprudence. Judge Hand said, in 1944, in the midst of the war we were then waging against the forces of darkness:

> . . . The spirit of liberty is the spirit
> which is not too sure that it is right; the

spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who, near two thousand years ago, taught mankind the lesson that it has never learned, but has never quite forgotten, that there may be a kingdom where the least shall be heard and considered side by side with the greatest.

The CHAIRMAN. Thank you very much, Professor.

I will begin the questioning. During his appearance before this committee, Judge Bork indicated that he would not overturn settled law in several issues. Now, these issues include equal protection for women, advocacy of law violation in freedom of speech and non-political speech—all areas where Judge Bork said he continues to disagree with the Court's substantive doctrines.

I think that Senator Specter stated our dilemma on these commitments very well when he asked, and I quote, "When the next set of facts comes up, if you disagree with the philosophy, how will you decide the case? And you answered it, I think, the only way a man can answer it: You are going to do your best to uphold your oath of office and uphold the Constitution and uphold the principles of the case."

Now, this dilemma for the members of this committee, because of Judge Bork's disagreement on principles, means that his interpretation of the Constitution and the principles in those landmark cases will sometimes come in direct conflict: his principles and his agreement to uphold precedent.

So even accepting that he will not overturn settled principles, although he had not defined which are settled and what are not settled principles, notwithstanding the fact that he will not overturn certain settled principles because there are too many private expectations built around them, how will he rule on cases applying these principles where, by definition, the expectations are not very clear? That seems to be one of our dilemmas.

What do you think his settled law commitments would mean in practice as a Justice on the Court?

Mr. KURLAND. I cannot give you an answer to that question, Mr. Chairman. The fact of the matter is that I think nobody can deny that a Senator's "philosophy," a Justice's philosophy, a Justice's personal predilections are always involved in the judgment that he makes. However pure a "judicial restraintist" you may think of yourself, there are certain elements of your background, history and learning that cannot be disposed of simply by willing it that way.

I have another problem, I must say, about so large a change of point of view coming in the course of these hearings. I think those commitments which you mentioned are a different point of view than were expressed earlier by Judge Bork, either in his speeches or in his opinions.

I did not see much of the hearings preceding today, but I did have a feeling that if we had been fortunate or unfortunate enough to have television cameras during the time of the Spanish Inquisition or the Court of Star Chamber, the effect on the witnesses may not have been very different then than they are now. In other words, I am trying to say that a——

The CHAIRMAN. I think you said it. [Laughter.]

Mr. KURLAND. What I am trying to relieve myself of is accusing you of impropriety or abuse because that is not what I am thinking. I am saying that the pressures of responding to 4 or 5 days of questioning would not be considered avoiding coercion if what you were talking about was a prisoner being dealt with by the police who have him in custody.

The CHAIRMAN. He may have had reason to change his position, is what you are saying, I think.

My time is about up, and you can elaborate on it if you would like. But we have heard two other things about Judge Bork repeatedly. One is that all those cases were used that would all acknowledge very strong language in deriding the Supreme Court's decisions, we were told that it was not the decisions he disagreed with—the clear implication being that he agreed with all the results; he just disagreed with the reasoning.

The second thing is that he really is like Frankfurter or Harlan or Black, he is no different than they are in the way in which he approaches cases. This is just a good, solid conservative.

Now, you clerked for Mr. Justice Frankfurter. You also clerked for Learned Hand, as I am told.

Mr. KURLAND. That is not right.

The CHAIRMAN. Pardon me?

Mr. KURLAND. I worked at the Second Circuit when he was working there, but I did not clerk for him.

The CHAIRMAN. You clerked for Justice Frankfurter, though?

Mr. KURLAND. Yes, I did.

The CHAIRMAN. Now, can you respond to that? Taking a page from Arlen Specter's book asking a two-pronged question at the end of the 5 minutes. Can you respond to the characterization that he really would reach the same results in all these privacy cases, it is just the reasoning he disagreed with? And he is just like Frankfurter, Harlan and Black? Which are two things we have been told.

Mr. KURLAND. You put questions that I find impossible to answer, Senator. The problem for me is you have got persons who are comparatively, if not absolutely, distinctive. In making comparisons with these giants, you have to ask in what particular way the comparison is to be made.

If you are talking about treating the Constitution as a living, growing document, concerned with the protection of the liberties of the people, I would say that Judge Bork's statements with regard to the cases that he has condemned are not like those of Frankfurter, Harlan, Powell point of view, although I would not put all three of them in the same category.

It is quite true that a good deal of Mr. Justice Frankfurter's approach to the exercise of jurisdiction by the Supreme Court was a very narrow view of when it should operate. To that degree, Judge Bork is in the tradition of strict constructionist as to the Court's jurisdiction.

But I cannot think of two people's jurisprudential approach that I would consider more different than Justice Frankfurter's and Judge Bork's. The notions of the breadth and width and depth of the Constitution are very different.

The CHAIRMAN. Thank you very much.

Senator Thurmond.

Senator THURMOND. Thank you very much. We are glad to have you here. I have no questions.

Mr. KURLAND. Thank you, Senator.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Perhaps to be more precise, because clearly one of the very important and significant areas which has been pursued by this committee is not just the question of the right to privacy but what the Constitution really means in terms of liberty. You speak to that in your statement here.

I think it is fair to suggest that Judge Bork's concept is that liberty has to be enumerated within the Constitution. He has not been able to find other ways of finding protections for some of the important areas of liberty which others have found inherent in terms of both the Constitution and the Bill of Rights.

What Justice Frankfurter has talked about is the concept of ordered liberty. You responded in a general way. Is there anything else that you find at the basis and the heart of one of your real concerns?

Mr. **Kurland**. My concern is very much that by providing as narrow a construction of the Constitution as possible with regard to individual rights and liberties, Judge Bork would be denying the essence of purpose behind the Constitution's origins 200 years ago, which was the preservation of all the liberties that the English legal tradition had created and were in the process of creating and were expected to continue to create.

I think it is that process, essentially, that Mr. Justice Frankfurter was referring to when he talked about the concept of ordered liberty, although the phrase is not his. It comes from Mr. Justice Cardozo, I think in *Palko* v. *Connecticut*.

I think it makes all the difference in the world whether you start with the notion that the people have all the liberties except those that are specifically taken away from them, or you start with the notion, as I think Judge Bork now has, that they have no liberties except those which are granted to them.

The fact of the matter is that at the time of the framing of the Constitution "we the people" did not confer liberties on "us the people." It did not have to be done.

Senator **Kennedy**. You believe that that is a very fundamental distinction?

Mr. **Kurland**. I do not know of anything more fundamental in our Constitution, Senator.

Senator **Kennedy**. Second point: You not only wrote about Felix Frankfurter, but I think many of us are mindful of your service here in working closely with Senator Ervin and his great consideration of the separation of powers. We had the panels earlier today that reviewed with us the view of Mr. Bork on the role of presidential power and the role of the Congress.

I am wondering whether in reviewing both the writings of Judge Bork and his testimony before the committee you have formed any impression whether he would be an activist in sustaining a disproportionate amount of power within the presidency as against the Congress; or whether you take any issue with his view about the appropriate division of power between the Congress and the executive?

Mr. **Kurland**. I suppose, Senator, that one of the reasons I am labeled a conservative is that, as I read the Constitution, it gives all the powers that it had authority to give to the Congress of the United States except for the Presidential power to receive ambassadors and to be Commander-in-Chief of the armed services. I do not see the second article creating any powers in the presidency. The presidency's primary function is to execute the laws that Congress enacts.

With that attitude, talking about my attitude that I just expressed, it would be hard for me to say that I do not disagree—I will avoid the double negatives—I do disagree with the very broad reading of presidential authority that Judge Bork has given, has spoken about, and I expect would give if the opportunity came to him as a Justice of the Supreme Court.

Senator KENNEDY. My time is up, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Simpson.

Senator SIMPSON. Professor Kurland, I have been interested in your testimony and have read your remarks. I have been more interested in your writings over the years which are rather flavorful and pungent and filled with exciting alliteration.

I was taken by that because it seems to me you write an awfully lot like Judge Bork.

Mr. KURLAND. One of us should probably resent that remark.

Senator SIMPSON. One of you could resent that. I think that is true. That could be.

But the general tenor of your writings—I was a little interested in that. In this text here, "Politics, the Constitution, and the Warren Court," you said the Warren Court, as has been suggested, the road to hell is paved with good intentions. The Warren Court has been among the great road builders of all time if, as suggested, the road to hell is paved.

That was interesting. That sounds Bork-like. This was the one of a racially mixed couple to get an injunction against a developer who would not sell them a house. You said the court reached this worthy goal by "dubious logic and abominable historicism." Other questions, the reapportionment case represented a sterile concept of equality. There is an element of Catch-22 in the opinions in these cases.

And then in the criminal procedure cases of the Warren Court, "precedents both hoary and young were felled with the precision of modern lumberjacks cutting through a forest. The list of opinions destroyed by the Warren Court reads like a table of contents from an old constitutional law casebook."

There are many more of those statements. You called *Miranda* "highly overrated." You call the poll tax decisions "one of the Court's shakiest opinions." And you made some statements and wrote some articles where you got blasted just as bad as Bork. One in 1964, a New Republic article, the year after his article, where the New York Times said one of your articles, it said, "It must go down as one of the most sarcastic, all-inclusive works of criticism directed at the Court in recent years."

What I am saying there is that it is difficult for me to hear you talk about these things as if people did not do scholarship like Judge Bork sometimes, or that perhaps that is not the way it should be done. It is not in this statement, but other statements like the opinion, "The Battle Over Bork" from the American Lawyer, the Chicago Tribune, the Harvard Law Review article about the Supreme Court in the 1963 term and the article of 1978 on the "Irrelevance of the Constitution." Those are provocative things, and that is why Robert Bork is in trouble, provocative things.

So you, too, as in "The Mikado," may have had a little list, at least about the Warren Court.

Mr. **KURLAND**. Senator, there are at least two major differences. First, I have never been a candidate to the Supreme Court office.

Senator **SIMPSON**. Have you ever thought about it?

Mr. **KURLAND**. There are only two persons who mentioned the possibility: One was Senator Ervin in an over-abundance of generosity, and the other was my mother-in-law. [Laughter.]

The real difference between us, I will concede that I have criticized and will continue, I expect, to criticize judicial opinions in the exercise of what I think is my professorial function. But once the Court has rendered its decision, I think that the fact that it is based on erroneous reasoning or poor precedent or doctrine does not in any way make it an invalid, unconstitutional or reversible opinion for that reason. That is where Judge Bork and I part company.

There is another distinction, if I may say so, and that is in the willingness to read the liberty provisions of the Constitution broadly rather than narrowly.

Senator **SIMPSON**. But you do not have any problem with the honesty and integrity of Judge Robert Bork.

Mr. **KURLAND**. I will repeat that as often as you ask me to under oath.

Senator **SIMPSON**. I think that is important, because there was a discussion of the change of his position here before us which certainly would lead to that conclusion.

Mr. **KURLAND**. I suggested that I was understanding of the amount of pressure that the witness was under after however many days he was on the stand.

Senator **SIMPSON**. It was not quite like the Spanish Inquisition. Thank you, Mr. Chairman. Thank you, Professor Kurland.

Mr. **KURLAND**. Thank you, Senator.

The **CHAIRMAN**. You are giving ground so easily, Senator Simpson.

The Senator from Pennsylvania.

Senator **SPECTER**. Thank you, Mr. Chairman.

Professor Kurland, you have commented about the Spanish Inquisition, the Star Chamber, some slight humorous suggestion about a coerced confession. I had asked Judge Bork about *Ashcraft* v. *Tennessee.* We kept him longer than the defendants in *Ashcraft* v. *Tennessee.* If we decide to keep you here for 5 days, do you think by Friday you will support Judge Bork?

Mr. **KURLAND**. I do not know whether I am more likely to bow to pressure than my predecessor in this chair or not.

Senator **SPECTER**. I may make that motion.

Mr. **KURLAND**. I think we will each claim to be a man of principle and give you a try at it.

Senator **SPECTER**. I may make that motion at the end of my 5 minutes to keep you here for 5 days.

You wrote about Judge Bork saying that he has gone from podium to podium since becoming a judge, electioneering to become a Justice. Do I detect some suggestion in that comment that there is anything improper about that?

Mr. KURLAND. I regard it as a statement of fact that most Washington lawyers would confirm. No, I——

Senator SPECTER. In this body, it may be a compliment rather than a criticism.

Mr. KURLAND. I think earlier today there was discussion here about the desirability of persons seeking the office making their positions known.

Senator SPECTER. But is there really anything wrong with that, if he has gone from podium to podium campaigning to be a Justice, articulating his views, letting his qualifications be known?

Mr. KURLAND. I have not complained about it or criticized it.

Senator SPECTER. Professor Kurland, in your statement you have referred to *Aguilar* v. *Felton* and also to *Engel* v. *Vitale*, and I am wondering where you derive the source as to his position on these cases.

He made a comment in two of his speeches at the University of Chicago and at Brookings, one on *Aguilar* when it was in the circuit, and later, saying that there might not be any great mischief. But I do not know that he really dealt with *Aguilar* in sufficient detail to say that he approved of it.

I have read all of the materials I can find by Judge Bork. I do not know that he ever said that he approved of *Engel* v. *Vitale*. Do you have any source material for those positions?

Mr. KURLAND. You mean that he disapproved of *Engel?*

Senator SPECTER. Well, that he disapproved of *Engel* v. *Vitale*, that he was in favor—that he took a position saying that school prayer was constitutional.

Mr. KURLAND. I cannot tell you that he came out and said that in so many words. There were three speeches in a row, one at Brookings, one at the University of Chicago, and I have forgotten where the third one was. I think it was——

Senator SPECTER. I only know of two. I would be interested in a third speech where he dealt with those subjects.

Mr. KURLAND. I will see whether that can be supplied to you.

The general discussions that followed at the University of Chicago quite clearly indicated his belief in the over-extension of the separation provision by the Court.

Senator SPECTER. When you say discussion that followed, is that beyond his prepared text?

Mr. KURLAND. As far as I know. There is no recording.

Senator SPECTER. Well, there is a text of his speech at the University of Chicago.

Mr. KURLAND. Yes, I know. The three texts I suggested——

Senator SPECTER. Were you present at the University of Chicago speech?

Mr. KURLAND. Yes.

Senator SPECTER. And what do you recollect that he said?

Mr. KURLAND. Just as I suggested earlier a belief that the establishment clause had been over-broadly applied.

Senator SPECTER. Because he does not say that in the two texts which I have seen, either at the University of Chicago or at Brookings. He writes about the privatization of morality, and he makes some comments about it; but he leaves the question open and does not make any comment about constitutionality on those issues.

Mr. **Kurland**. Senator, I do not wish to mislead you on those propositions. I do not think he came out and said in so many words about either of those cases that he regarded them as appropriate for the wastebasket.

Senator **Specter**. Final question at the bell. Professor Priest from Yale testified last week about the current standards post-World War II of professors taking very strong positions with very strong language, and we have seen a fair amount of Judge Bork's comments in that respect: illegitimacy of the court, civil disobedience, make your arguments to the Joint Chiefs of Staff, et cetera.

Your writings, very profound—you are nodding in the negative—have been of a similar tone. One of the things that we are concerned about, that I am concerned about—I should speak for myself—is how the forcefulness of Judge Bork's statements bears upon the power of his positions which have previously been expressed and which have been modified in these hearings.

My question for you is, considering the writings which you have made and considering Professor Priest's statements about the trend of the times, post-World War II academicians to speak in very forceful language and to obliterate all other philosophies, including the institutions even if they are the Supreme Court, does that necessarily reflect the depth of conviction that cannot be overturned; or is that more in tone with the way powerful academicians write, like yourself and Judge Bork?

Mr. **Kurland**. I think academicians like to write in such a fashion as will attract readership and be cogent at the same time. I think they express themselves as best they can, and if it is readable, so much the better.

I think we have all tried to get away from the old days when every bit of professorial writing looked like an ALR note, a series of short statements followed by a long series of citations.

I do not think that the language that Judge Bork has used can in any way be regarded as contumacious or extraordinarily——

Senator **Specter**. Hyperbole as opposed to immutable dogma?

Mr. **Kurland**. Right.

Senator **Specter**. Thank you very much, Professor Kurland Thank you, Mr. Chairman.

Mr. **Kurland**. Thank you, Senator.

Senator **Kennedy**. The Senator from Utah, Mr. Hatch.

Senator **Hatch**. Thank you, Mr. Chairman.

Professor Kurland, welcome to the committee.

Mr. **Kurland**. Senator Hatch.

Senator **Hatch**. I welcome you as a vital witness because, first of all, you are the only academic among all those have called so far in opposition to Judge Bork who has any claim at all to legal conservatism, if I can use that as a shorthand phrase.

We have heard professors holding almost every legal viewpoint support Judge Bork's nomination, but among that academics who have opposed his nomination, I think you are the only one not occupying a narrow niche on the left. So I think your testimony is very important.

With this in mind, Professor, I would particularly welcome you on virtually every controversial case and doctrine the committee has examined to date, because you have taken a position, as Judge Bork has, either the same as he or you have taken a more conservative one.

Let me just review those quickly. In your Tribune article and your testimony, you compile a long list of cases where Judge Bork has criticized various cases, but you fail to note that you were at least as harshly critical on most of the cases you cited as he was. As the Chicago Tribune wrote of your criticisms, they said, "Professor Kurland apparently will not take yes for an answer, at least when it comes from Judge Bork."

Let me just take some of these one by one. The *Harper* case, the poll tax case you called "one of the Court's shakiest opinions." In *Roe* v. *Wade*, the abortion case, you say it has "no justification." In *Griswold*, the contraceptive privacy case, you called it a "blatant usurpation." The one-man, one-vote case and the racial covenant cases, you called "most unsatisfying."

So that even goes beyond Judge Bork because he would uphold the *Baker* v. *Carr* case, for instance, and the *Engel* school prayer case.

By the way, I think that the record shows that Judge Bork took no position, and has taken no position on that particular school prayer case, or at least I am not aware of it, and I do not think you can show any writings where he has taken a position.

Now best of all, you criticize Bork's *Bakke's* writings. On the *Bakke* case, when you found briefs against reverse discrimination in both the *Defunis* and the *Webber* cases.

In fact out of the list of nine cases you cited, you have criticized five at least as harshly, and on two Bork has taken no position, and on one, the *Katzenbach* case, Bork would not let Congress overturn a Supreme Court ruling by a simple majority vote in Congress.

Now, do you feel that the questions that you and Judge Bork raise about the reasoning of some of these cases are extreme?

Mr. KURLAND. Senator, I think I responded to that issue before you came into the room.

Senator HATCH. Well, you did, partially.

Mr. KURLAND. I will—I am not trying to avoid answering it now.

Senator HATCH. Well, have I misquoted you?

Mr. KURLAND. My criticism of the Supreme Court decisions has been at least as harsh as Judge Bork's criticisms.

Senator HATCH. I think so.

Mr. KURLAND. The difference, however, is that I do not regard my criticisms as removing them from the area of controlling doctrine, and as part of the constitutional law of the nation.

I do not believe that my distaste for whatever the Court has done, or the way that it has done it, makes any question about the legitimacy of the decisions.

Senator HATCH. Well, I do not think Judge Bork is any different. He respects precedent as well, and certainly has stated——

Mr. **Kurland**. Well, I would challenge that. As I said in my statement, and has—and he has written—and before he came before this committee—he regarded a large number of decisions as unconstitutional and invalid, and ripe for overruling, including at least some of those that he testified about here, and explained his criticism as being somewhat less sharp than mine.

Senator **Hatch**. Well, let me just say this: you say that Judge Bork disapproved of the reapportionment cases, and in fact do you know whether he ever criticized *Baker* v. *Carr,* the reapportionment case?

I understand, personally, that he would have voted exactly the same way in that case, but under different reasoning. He would have decided *Baker* v. *Carr* under the guarantee of republican government clause of the Constitution, rather than as they decided it.

Mr. **Kurland**. I did not see that in his writing.

Senator **Hatch**. Yeah, that is part——

Mr. **Kurland**. I only saw that he disapproved of the decision.

Senator **Hatch**. I see. Well, that is a fact. One last question, and that is——

Senator **Kennedy**. The Senator's time is up.

Senator **Hatch**. Well, could I just ask this last question? I think he will answer it. It is right along the same lines, and then I will quit.

Do you feel that professors like you and Judge Bork—you are, and Judge Bork is today—should be free to write provocative articles on these cases and on the law itself?

Mr. **Kurland**. I know that we should be. I have no hesitancy to say that I am.

Senator **Hatch**. Okay. Thank you.

Senator **Kennedy**. Senator Humphrey.

Senator **Humphrey**. Thank you, Mr. Chairman.

Professor, welcome.

Mr. **Kurland**. Thank you, Senator.

Senator **Humphrey**. Apropos the——

Senator **Kennedy**. Would the Senator just yield for a comment?

Senator **Humphrey**. Yes.

Senator **Kennedy**. I have been told by Senator Biden that we will not take a luncheon recess and will continue with the course of the hearings. So I would hope that the staff members of the members of the committee would so notify their members. I will let the chairman speak for himself on that issue.

The **Chairman**. The issue being continuing?

Senator **Kennedy**. Yes.

The **Chairman**. I would like to continue straight through, if we could, and has everyone questioned——

Senator **Kennedy**. No. The Senator from——

The **Chairman**. The Senator from New Hampshire.

Senator **Humphrey**. Professor, apropos the discussion which you and Senator Hatch just had on the doctrine of stare decisis, I sat here through virtually every minute of five days of testimony and examination of Judge Bork, and he made it crystal clear, perfectly clear, that while he has contested many of the Supreme Court decisions, as you have, and as have many eminent scholars, and, indeed, Justices, that he has a high regard for the doctrine of stare decisis.

That precedent must be respected. It is not sacrosanct of course, and no nominee would suggest that it is, but that the Justices must move with the greatest caution in overturning previous decisions, especially where certain societal expectations have been built up.

So you seem to be trying to draw a distinction between you and Judge Bork, saying yes, that you have both written contentious, readable articles, as you put it, lively articles criticizing Court decisions, but somehow, you suggest on the other hand, that Judge Bork's views would be overriding, that he would not have regard, or sufficient regard for stare decisis.

I really believe you to be mistaken. You may be sincerely, and probably are sincerely mistaken, but if you had sat here through 5 days of testimony, at least with my ears, you would not have too much concern on that score.

Mr. KURLAND. I assume you are asking me a question and my——

Senator HUMPHREY. Well, I want to give you a chance to respond. You can do so in any fashion.

Mr. KURLAND. My statement is based on nothing that occurred after these hearings started, but on statements that Judge Bork made both before congressional committees, senatorial committees, and on the podium in the course of the last few years while he was on the circuit that Senator Specter was talking about.

Senator HUMPHREY. Yes.

Mr. KURLAND. And I think I can supply you, if you would like, with a large number of his stated positions about the fragility of decisions that he disapproved of.

Senator HUMPHREY. Yes. Well, no question about it. No question about it. The point is that in upholding stare decisis you need not think the underpinnings of a particular decisions are perfectly sound. Quite the contrary. That you can legitimately uphold a decision that you think is perfectly unsound if you believe that it is unwise to overturn it for some reason of stability.

In the last couple of minutes I have, I want to ask you about some of the criticisms you have made of some landmark decisions in which Robert Bork shares your criticisms. I look at the piece you wrote entitled "The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court," which I think is the Villanova Law Review, but, in any event, is it one of your prominent pieces.

You say that—in part, of course—speaking of the Court: "When the Constitution affords no mandate it—the Court—will fill the hiatus with ersatz constitutional rules of its own making."

That is a complaint, I assume. Am I correct? That is a complaint. It is not just a mere statement of fact, but it is a complaint. That where—to use your words—"When the Constitution affords no mandate, the Court will fill the hiatus with ersatz constitutional rules of its own making."

You go on to say: "This is neither a novel approach nor one limited to the construction of the religion clauses. One need look only to *Lochner* v. *New York*, *Atkins* v. *Children's Hospital*, for earlier examples, to *Griswold*, to *Roe*, and to *Doe* for more recent ones, all blatant usurpation of the Constitution-making function than the cases that I have canvassed here."

These are criticisms. Am I reading it correctly? You are critical of the Court for usurping the Constitution-making function?

Mr. **Kurland**. I am critical of substantive due process, yes.

Senator **Humphrey**. Well, that of course is the central criticism of Judge Bork. He means it in the same regard that you do.

You know, we have had a lot of discussion in here about privacy. It is one of those sensational issues, because people think, my gosh, if my neighbors, or my associates knew what happened in my bedroom, or in my living room, or elsewhere, that life would be very much more interesting.

The point I am trying to make is, no one wants to lose a shred of his privacy, but that is not the real point. That is a red herring.

What the privacy issue has looked at in this hearing is principally *Griswold,* and you yourself are, and were critical of the *Griswold* decision, were you not?

Mr. **Kurland**. Yes.

Senator **Humphrey**. Do you agree with Robert Bork that the Court made up its own rules when it came to a decision in *Griswold,* came to the decision that it did?

Mr. **Kurland**. Yes. I think Mr. Justice Douglas made up his own rules.

Senator **Humphrey**. Made up his own rules. Well, that is——

Mr. **Kurland**. May I respond to the problem of privacy as you stated it?

Senator **Humphrey**. Yes, but let me just ask you this, first.

Do you agree with Judge Bork, that there is not an unincumbered right to privacy in the Constitution?

Mr. **Kurland**. There is not an unincumbered right in the Constitution——

Senator **Humphrey**. If you look at some——

Mr. **Kurland** [continuing]. To privacy or anything else.

Senator **Humphrey**. I do not agree with that. I think there are certain very clear—there are certain rights enunciated in the Constitution which are unincumbered in any way, but I do not want to get off the focus here.

Mr. **Kurland**. Well, Mr. Justice Black used to say that the right to speech was unincumbered in any way, but I do not think the case is substantiated—that position.

Senator **Humphrey**. In any event, you felt that in *Griswold* the Court overstepped reasonable bounds, and it made up its own rules. So you agree with Judge Bork, in the case of *Griswold*?

Mr. **Kurland**. I did, yes.

Senator **Humphrey**. And you still do. It is not that you want to put TV cameras in everyone's bedroom, I hope?

Mr. **Kurland**. Well, after the discussion I heard a little bit earlier in this conference room, I have some question.

The committee seemed very exercised about the fact that somebody was looking into their rentals of VCR's, and regarded that as a terrible invasion of privacy, but had no concern about the possibility of the police determining what form of sexual activity is engaged in between consenting adults.

That was not something that aroused their ire, and venomous attack on the press.

Senator HUMPHREY. All right. Thank you, Mr. Chairman.

I just wanted to make the point that even someone who is appearing here in opposition to confirmation agreed with the nominee on the *Griswold* case on which this whole privacy brouhaha in these hearings has turned.

Mr. KURLAND. Let me make my point for a third, and surely the last time.

My disagreements with Bork have not been over the criticisms of the cases that he rejects, but about the effect that those criticisms should have. I do not think that criticism by any professor is sufficient to invalidate a Supreme Court judgment.

Senator HUMPHREY. Of course, and I am glad to hear you say that. I would simply respond by suggesting that you read the transcript.

The doctrine of stare decisis was repeatedly brought up. Senator Specter questioned the nominee very, very closely on this, and I think you will be a good deal reassured if you read that.

He was under oath, as all witnesses have been, and I think he spoke very sincerely.

Mr. KURLAND. Thank you, Senator.

The CHAIRMAN. Professor Kurland, is your view on the right of privacy the same as Judge Bork's, to the best of your knowledge, to the extent that one exists or does not exist within the Constitution?

Mr. KURLAND. It is not now, no. That is, I have come to realize this through the book that I just edited, which was the—it is called "The Founder's Constitution" and consists of all of the, or most of the writings and documents relating to the framing.

I have come to a different realization of the breadth of the rights of Englishmen, that was sought to be protected by the Constitution makers.

So that while I was prepared to argue as to whether the right of privacy should be included among those rights, my position now is that there is no doubt about the Court's capacity to create that right. Not to create it, but to affirm it.

Senator KENNEDY. Mr. Chairman, I just had one other area. I would be glad to make up the time I might use on this question this afternoon, but I think it is important.

In the earlier exchange, Professor, we talked about the different concepts of liberty, and I think the record is very clear about your assessment of Judge Bork's view of the Constitution.

Now we have a second issue—on the question of precedents. The record is complete with the statements of Judge Bork—he was talking about the ratcheting up of various decisions, and then, in the last part of his statement that was played here before the committee he said: "I don't think precedent is all that important. I think the importance is what the Framers are driving at, to go back to that."

Now he was asked about the role of precedents, and he was very clear that he would follow precedent as it relates to the commerce clause, the *Brandenburg* decision, as it related to the first amendment, and the legal-tender decisions.

But he was not as clear in one of the areas about which I think many of us are most concerned, and that is with regard to individual rights and liberties—the privacy issue.

Given what he has said as an originalist thinker, and given his statements here about the limitations of the Constitution in enhancing, or even defining, the kinds of rights and liberties that are being protected, would this be an area that would be of very considerable concern to you, should he be approved—that there may be a significant threat to the rights and liberties of American citizens? Or at least that his decisions would not enhance those rights and liberties, such as privacy, and as Griffin Bell pointed out, the right to be left alone?

Mr. **Kurland.** I want to separate two things because if the argument turns solely on stare decisis, I am unable to respond to Senator Humphrey's statement about the testimony that was given by Bork, and I am certainly unable to put myself in your place as to assessing its credibility.

As to Judge Bork's announcement of a majoritarian principle which would give to the—in the future—which would give the majority in this country the right to impose a morality on the minority, I find that frightening and a clear violation—or would be a clear violation of the Bill of Rights.

Or, I would add, the rights of the people are not confined to those which might derive from the ninth amendment. The suggestion you made about Mr. Justice Frankfurter's position certainly puts that into the due process clause of both the 5th and the 14th amendments.

And I have a paper which has not been mentioned. I do not doubt that it need not be mentioned, about the possible use of the privileges and immunities clause of the 14th amendment to come to the aid of individual liberties in the future.

The **Chairman.** Thank you very much professor, we appreciate your time and your testimony.

Our next panel—they may not all be here; I guess they all thought we were going to break for lunch, so some may still be at lunch, but we will call them as they come in—is made up of A. Raymond Randolph, Stuart Smith, Jewel LaFontant, and Governor Richard Thornburgh. If they are here, if they will come forward—and while they are coming forward, I will introduce them.

First is A. Raymond Randolph. Mr. Randolph is currently a partner in the law firm of Pepper, Hamilton & Scheetz, and was Deputy Solicitor General. Second is Stuart Smith. Mr. Smith is a partner in the New York City law firm of Shea & Gold, and was a tax assistant to the Solicitor General. Third, Ms. Jewel LaFontant. Ms. LaFontant is a senior partner in the Chicago law firm of Vedder, Price, Kaufman and Kammholz, and was Deputy Solicitor General. And the fourth member of the panel is Richard Thornburgh, who is the distinguished past Governor of the State of Pennsylvania, the Commonwealth of Pennsylvania, between 1979 and 1987. Governor Thornburgh was Assistant Attorney General for the Criminal Division.

Would you all please stand and be sworn.

[Witnesses stand.]

The **Chairman**. Do you swear the testimony you are about to give is the whole truth and nothing but the truth, so help you God?

[All say "I do".]

The **Chairman**. I welcome you all, and I apologize if you were sent mis-signals here as to us moving forward, and I appreciate your acceding to the minority's request to allow former Attorney General Griffin Bell to precede you. Your understanding is very much appreciated.

Senator **Kennedy**. Would the Chairman yield?

The **Chairman**. Surely.

Senator **Kennedy**. Just one item in Governor Thornburgh's biography has been left out. He is currently the director of the John F. Kennedy Institute of Politics up in Cambridge. I've enjoyed working with him, and he is doing an outstanding job there. So I want to extend a personal welcome to him as well as to the other members of the panel.

The **Chairman**. I apologize, Governor.

Now, do you have a preference in which you will precede? All right, we will start with Governor Thornburgh and we will move from——

Governor **Thornburgh**. By dint of seniority and not of wisdom, Mr. Chairman.

AFTERNOON SESSION

TESTIMONY OF A PANEL CONSISTING OF RICHARD THORNBURGH, A. RAYMOND RANDOLPH, STUART SMITH, AND JEWEL LaFONTANT

Mr. **Thornburgh**. Good afternoon to you, Mr. Chairman, and the members of the committee. I am here in support of Judge Bork's nomination. I served with Judge Bork in the federal government prior to my 1979 election as Governor of Pennsylvania. During the years from 1975 to 1977, I served by appointment of President Gerald Ford as Assistant Attorney General in charge of the Criminal Division of the U.S. Department of Justice, and in that role worked closely with Judge Robert Bork, then the Solicitor General of the United States.

In those immediate post-Watergate years, restoring the confidence of the American people in the integrity of their government, and the people who served in government, was a number one priority of the Department of Justice. As part of this effort we established the Public Integrity Section of the Criminal Division, which has, over the past 10 years, provided an effective mechanism to assure the prosecution of those in public life who seek to operate for private gain and not for public good.

During my service in the Department of Justice, I worked closely on many matters with Judge Bork relating to the integrity of government and the enforcement of our criminal laws. I observed him to be a strong advocate of fair and effective law enforcement, committed to ensuring high standards in government as well as the protection of what I regard as the first civil right of all Americans, the right to be free from fear of violent crime in their homes, in their streets, and in their communities.

I came to know Bob Bork as an extremely able and intelligent lawyer. I also came to know Bob Bork to be a man of personal integrity and a man of commitment to the rule of law. I know that Bob Bork shares with me a deep concern in ensuring that the criminal laws of this country are enforced through effective investigation and fair trials conducted in keeping with the Constitution of this nation.

Earlier this month I participated in events in Philadelphia celebrating the 200th anniversary of the signing of our Constitution, that document which is the underpinning of our society and has enabled the United States to develop and grow into the greatest nation in the history of the world. The events there were moving, and the commemoration of that document over the past several months has been exceedingly positive and productive for this country.

We in this country need to be reminded of those principles upon which our nation was founded. We need to be reminded of the compromises made by the Founders, as well as the steps they took in writing into the Constitution procedures to review and resolve those issues which could not be foreseen in their era. We need to be reminded that no one person, whatever position that person holds in our government, rules with full and complete authority, and we need to be reminded of the great precedents which are embodied in the Constitution, the amendments to it, the laws which have been written in furtherance of the goals therein established, and the limits placed on the exercise of power by all three branches of government.

This committee has the responsibility established in that Constitution of providing for advice and consent on nominations made by the President. On this nomination you have heard from a wide number of distinguished Americans, and you have heard a wide variety of views, many of them in conflict with one another.

After reviewing all of the testimony and the comprehensive record of Judge Robert Bork as a lawyer, as a professor, a Solicitor General, and as a judge, I believe you will find him to be a staunch believer in that constitutional system, who would be a distinguished member of the Supreme Court of the United States.

Thank you, Mr. Chairman.

[Prepared statement follows:]

TESTIMONY OF

DICK THORNBURGH

BEFORE THE JUDICIARY COMMITTEE OF THE UNITED STATES SENATE

SEPTEMBER 28, 1987

Good morning, Mr. Chairman and members of the Committee. My name is Dick Thornburgh. I currently serve as the director of the Institute of Politics at the John F. Kennedy School of Government at Harvard, and as a lawyer in private practice with the firm of Kirkpatrick & Lockhart in Pittsburgh.

Prior to my 1979 election as governor of Pennsylvania, I served the federal government for eight years in the law enforcement field. During two of those years, from 1975 to 1977, I was assistant attorney general in charge of the Criminal Division of the United States Department of Justice and in that role I worked closely with Judge Robert Bork, then the Solicitor General of the United States.

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And, we need to be reminded of the great precedents which are embodied in the Constitution, the amendments to it, the laws which have been written in furtherance of the goals therein established and the limits placed on the exercise of power by all three branches of government.

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The CHAIRMAN. Thank you very much.
Mr. Randolph.

TESTIMONY OF A. RAYMOND RANDOLPH

Mr. RANDOLPH. Thank you, Mr. Chairman and members of the committee. I would like to address the committee as a member of the bar of the Supreme Court and as someone who has twice worked in the Office of the Solicitor General of the United States.

From the period of 1973 to 1977, when Robert Bork served as Solicitor General, there was, with the exception of the Justices themselves, no more powerful person in America with more opportunity to influence the course of Supreme Court decisions than Robert Bork. As Solicitor General he was involved in more than one-half of all cases decided by the Supreme Court over a 4-year period. As Solicitor General, he shaped the government's arguments, decided what cases to present to the Supreme Court, and how. He was the top litigating officer in the federal government, in charge of all of its Supreme Court litigation.

During these hearings something has been forgotten—namely to what extent one can gain an insight into how Robert Bork would perform as an Associate Justice of the Supreme Court by looking at his performance as what is sometimes called the "tenth Justice of the United States," that is, Solicitor General.

As Solicitor General, Robert Bork's record was outstanding. I have followed these hearings carefully and there has not been a single witness who has disputed that assessment.

When I was asked to return to the Solicitor General's office in 1975, after having worked there for 3 years under Dean Erwin Griswold, a great Solicitor General himself, I knew but three things about Robert Bork. I knew he had been a Yale law professor, I knew that he fired Archibald Cox, and I knew that he had written an Indiana Law Journal article, which I had read.

I did not leap at the opportunity. Instead I talked to people who knew Judge Bork and had worked with him. One of those persons was Lawrence G. Wallace, who has been mentioned earlier in this hearing, and who is now perhaps best known for his refusal to sign the *Bob Jones University* brief. Lawrence Wallace has served many years in the Solicitor General's Office he is still there. For years he was in charge of the government's civil rights cases in the Supreme Court. He was a law clerk to Justice Black, and he is a personal friend of mine. Mr. Wallace gave me what turned out to be excellent advice: "Make your judgment on the basis of the experience of those who have worked with Judge Bork, which includes myself, particularly in civil rights cases." He also told me that civil rights enforcement had proceeded apace under Robert Bork's tenure.

I also called Judge Henry J. Friendly, whom I had clerked for years earlier. He gave me the same advice. He knew Alexander Bickel, and he had consulted with him. In watching these hearings, I have been reminded ~~of the preface to~~ Judge Friendly's book when, after years on the bench, he had published a collection of his articles, some of which were very critical of Supreme Court decisions. What Judge Friendly said in the preface to his book "Benchmarks" ought to be in the preface to the collection of Judge Bork's works as they have been submitted to this committee. I will quote: "Although I would put many of the thoughts expressed in these papers differently today and would reject a few altogether, I have thought it best to leave them substantially as they were written, . . ."—and this is the essential line—"hoping that readers will have the kindness to give some regard to the dates. Attempted rewriting would create a patchwork—neither what I wrote yesterday nor quite what I would say today." There is great wisdom in those remarks.

My years with Judge Bork confirmed everyone's assessment. One of the first cases I handled, within weeks of coming to the office, involved a pure speech case in which a gentleman had violated 18 U.S.C. 871, a federal statute making it a crime, without any "clear and present danger" overlay, to threaten the life of the President of the United States. Did Judge Bork push that case to its limits? Did he draw upon his Indiana Law Journal piece in the hope of having the Supreme Court adopt some agenda? No, that is not at all what happened. We studied the record in the case, and even though the gentleman's defense attorney had not raised it, we found that the defendant had been deprived of a fair trial, and we did what we were required to do: do justice. We confessed error in the Supreme Court of the United States, and the Court reversed his conviction.

I would like to end on one note. I have been practicing law before the Supreme Court for 17 years. I do not want a Justice who is predictable. I want a Justice who is openminded, and fair, who can be persuaded, who is not bound and controlled by sympathy. I want, in short, a Justice who is neutral, because otherwise my role as an advocate before the Court is of little use.

Robert Bork would make that kind of Justice.

[Statement follows:]

STATEMENT OF A. RAYMOND RANDOLPH
TO THE SENATE JUDICIARY COMMITTEE
SEPTEMBER 28, 1987

Mr. Chairman and Members of the Committee:

I appear here today in support of the nomination of Judge Robert H. Bork to be an Associate Justice of the Supreme Court of the United States.

I am a partner in the Washington office of Pepper, Hamilton & Scheetz. By way of introduction, I have included a biographical sketch in the margin.[1]

I wish to address the Committee as a member of the Bar of the Supreme Court, as a lawyer who has twice served in the Office of the Solicitor General of the United States, and as a friend and former colleague of Judge Bork.

From 1973 to 1977, Robert H. Bork served as Solicitor General of the United States. His performance was outstanding and no witness before this Committee has -- or could -- say otherwise. There is no better measure of what one could expect from Robert Bork as an Associate Justice. Yet his record as Solicitor General has been buried in an avalanche of testimony and materials about other matters. That is indeed unfortunate.

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[1] B.S. Drexel University (1969); J.D. University of Pennsylvania Law School (summa cum laude)(1969); Managing Editor, Law Review.

Law Clerk to Judge Henry J. Friendly, United States Court of Appeals for the Second Circuit (1969-70).

Assistant to the Solicitor General of the United States (1970-73); ; Deputy Solicitor General of the United States (1975-77); Special Counsel, Committee on Standards of Official Conduct, U.S. House of Representatives (1979-80).

Special Assistant Attorney General, State of Montana, 1983 - (honorary); Special Assistant Attorney General, State of New Mexico (1985 -); Special Assistant Attorney General, State of Utah (1986 -).

Member, American Law Institute; American Trial Lawyers Ass'n; Supreme Court Historical Society.

Adjunct Professor of Law, Georgetown Law Center (1974-78)

Bar Memberships: Supreme Court of the United States; United States Courts of Appeals for the First, Second, Fourth, Fifth, Sixth, Seventh, Ninth, Eleventh and D.C. Circuits; Supreme Court of California; District of Columbia Court of Appeals.

With the exception of the Justices themselves, there was no person in America who had more power and opportunity to influence Supreme Court decisions and the development of constitutional law than Robert Bork when he served as Solicitor General. Participating in more than half of all cases the Supreme Court decided during those four years, Solicitor General Bork not only shaped the cases as they were presented to the Supreme Court, but also played an important, indeed critical, role in determining which cases the Supreme Court would have an opportunity to decide.

Despite, or perhaps because of, his vital position as the bridge between the Judiciary and the Executive, Solicitor General Bork had extraordinary independence. He decided what position to take on behalf of the government and whether to confess error in cases the government had won in the lower courts; he determined whether to file amicus curiae briefs in cases to which the government was not a party and what should be said in those briefs; and he sat in judgment of hundreds of requests to allow the government to appeal from an unfavorable decision or to seek Supreme Court review. In no case during that period, did the federal government ask -- or refuse to ask -- the Supreme Court for relief without Solicitor General Bork's careful review and authorization.

Shortly after Robert Bork left office, the new Administration studied the independence of the Solicitor General and concluded that it had been established by Robert Bork and his distinguished predecessors in their steadfast performance of four basic functions: "The Solicitor General must coordinate conflicting views within the executive branch; he must protect the Court by presenting meritorious claims in a straightforward and professional manner and by screening out unmeritorious ones; he must assist in the orderly development of decisional law; and he must 'do justice' -- that is, he must discharge his office in accordance with law and insure that improper concerns do not influence the presentation of the Government's case in the Supreme Court." Office of Legal Counsel, Department of Justice, Memorandum for the Attorney General Re: The Role of the Solicitor General (1977).

As a young lawyer finishing a clerkship with one of the most distinguished judges in this century, Judge Henry J. Friendly, the Solicitor General's Office was where I wanted to start my legal career. In 1970, I became an Assistant to the Solicitor General, serving under then-Solicitor General Erwin N. Griswold, the former Dean of the Harvard Law School who had been appointed by President Johnson. During the next three years, I argued cases before the Supreme Court and wrote briefs for the government involving a variety of issues. In May 1973, shortly before Dean Griswold departed, I left the "S.G.'s" Office for private practice.

In early 1975, I was asked whether I would be interested in returning as a Deputy Solicitor General under then-Solicitor General Bork. Of Robert Bork, I knew only that he had been a Yale law professor, that he had fired Archibald Cox and that he had published a provocative article -- or more accurately, speech -- in the Indiana Law Journal, which I had read.

By that time, Judge Friendly had written a large number of articles, some quite critical of Supreme Court decisions, and had collected some of them in a volume entitled Benchmarks (1967). In considering the Indiana Law Journal piece published before Robert Bork had become Solicitor General, I was reminded of what Judge Friendly had written in the preface to Benchmarks (p. viii): "Although I would put many of the thoughts expressed in these papers differently today and would reject a few altogether, I have thought it best to leave them substantially as they were written, hoping that readers will have the kindness to give some regard to the dates. Attempted rewriting would create a patchwork -- neither what I wrote yesterday nor quite what I would say today." The wisdom of that message was important to me then, twelve years ago; it is, I believe, all the more important today in light of the course of these hearings.

Before accepting the position as a Deputy Solicitor General, I spoke at length with Lawrence G. Wallace, a former law clerk to

Justice Hugo Black. Mr. Wallace was also then a Deputy Solicitor General, as he still is, and for many years had been handling the government's civil rights litigation in the Supreme Court. (As Mr. Coleman testified, Mr. Wallace later became known for his refusal to sign the government's brief in the Bob Jones University case.) We had worked together on important cases supporting civil rights during my previous tenure in the S.G.'s Office and had won several major victories. Mr. Wallace spoke highly of Solicitor General Bork, told me that he was a decent and fair-minded man, and that civil rights enforcement had proceeded apace under his supervision. Judge Friendly knew of Robert Bork through Alexander Bickel at Yale and he too advised me to accept the position.

I began working as a Deputy with Solicitor General Bork in January 1975. The Department of Justice was back on an even keel, having changed remarkably since my departure in the spring of 1973 when morale was at a low and the story of Watergate was beginning to unfold. A short time after my arrival, I began to appreciate Robert Bork's extraordinary qualities.

The Supreme Court had taken a case (Rogers v. United States) involving a federal statute (18 U.S.C. 871) making a form of pure speech a felony, without any "clear and present danger" qualification. The statute punished by up to five years' imprisonment willful threats on the life of the President and had earlier been held constitutional in Watts v. United States, 394 U.S. 705.

I was the Deputy in charge of the Rogers case. One might have supposed that Solicitor General Bork would have pushed the case to limit, drawing on thoughts expressed in his Indiana Law Journal article, but that is not what happened. In reviewing the record in preparation for briefing the case, we discovered that notes had passed between the judge and jury outside the presence of counsel. Although the defendant's attorney had never raised the point and could have been deemed to have waived it, we determined that the defendant had been denied a fair trial. Solicitor General Bork therefore directed that United States "do justice" and confess error, which we did. As a result, the Supreme Court reversed the conviction. Rogers v. United States, 422 U.S. 35 (1975).

Thus began my time with Robert Bork, and for the next two years we worked together daily, holding countless meetings with those inside the government and out who sought to persuade the Solicitor General to take particular positions in the Supreme Court or to authorize petitions for Supreme Court review. From morning to evening, day in and day out, the great constitutional issues of the day filled our discussions, as hundreds of cases poured into the Office for briefing as they made their way to the Supreme Court. Did Solicitor General Bork have an "agenda"? Absolutely not. Was he a "rigid ideologue?" Ridiculous! Did he seek to set back civil rights or individual rights or women's rights? Absurd!

There is one description of Robert Bork that is accurate above all others. Biography often reveals as much about the writer as his subject and when Robert Bork wrote this about his departed friend, Alexander M. Bickel, he was in fact also describing himself: "He regarded every book, every article, as an experiment, not a final statement. He was always, moreover, open to argument, and his thinking changed in response to it, as well as to his own experience and second thoughts." Just as important, "because he was not frozen into a system, because he believed in the central importance of circumstance, the limited range of principles, the complexity of reality, he learned and evolved. It is impossible to give a snapshot of his philosophy. It was moving, deepening, to the end of his life."

This is the Robert Bork I knew when we worked together. This is the Robert Bork I know today. A moment's reflection shows that this is the Robert Bork the Committee heard during five days of calm, frank, open and dispassionate testimony.

During my years with Solicitor General Bork, there were many important cases, but one deserves special mention because it aroused so much passion and public debate. A ruling by the Supreme Court in 1972, on procedural grounds, had resulted in nullifying State and federal death penalty statutes. Furman v.

Georgia, 408 U.S. 238 (1972). Within a few short years, the legislatures of 35 States and the Congress of the United States had reenacted death penalty statutes complying with the procedural requirements of Furman. The issue whether the death penalty violated the Eighth Amendment to the Constitution was thus joined. The issue was argued once in the 1974 Term (Fowler v. North Carolina, No. 73-7031) and then set for reargument in the next year. In the meantime, the law reviews -- particularly the Yale Law Journal -- churned out reams of material on the subject.

As is nearly always the case in Supreme Court practice, what mattered was not what the law professors had to say. Instead, it was the Brief amicus curiae submitted by Solicitor General Bork, and signed by him, myself and Frank H. Easterbrook, then an Assistant in the Office and now himself a federal court of appeals judge, and Solicitor General Bork's stirring oral argument in the case by special leave of the Supreme Court.

At the center of the controversy stood the opposing argument, which urged the Court to declare the death penalty unconstitutional in violation of the Eighth Amendment because it contravened evolving standards of decency in America. Solicitor General Bork's answer is worth quoting at length because it captures so very much of his approach to arguments that, in one form or another, insist that the Supreme Court should fasten its moral views on the nation.

After pointing out that in the preceding few years 35 States and Congress had passed death penalty statutes, Solicitor General Bork's Brief stated as follows:

> How then can it be declared by this Court, by any court, that the death penalty contravenes evolving standards of decency or contemporary notions of human dignity or society's currently-held moral values? The framers of the Constitution "might have made the judge the mouthpiece of the common will, finding it out by his contacts with the people generally; but he would then have been ruler, like the Judges of Israel."

[Learned Hand, "How Far is a Judge Free in Rendering a Decision?" (1935), in The Spirit of Liberty 109 (Dilliard ed. 1960)]. The question cannot be avoided: if this Court were to hold that the death penalty violates evolving standards of decency, would not one then be required to conclude that 35 legislatures and the Congress of the United States are unenlightened, that they are out of step with contemporary moral standards and the will and spirit of the people who elected them? Courts announce their view of society's standards of decency and, by doing so, encourage public acceptance of what can at best be only a prediction. But with respect to the death penalty the Court has previously spoken [in Furman] and it has seen the response.

This is not to say that a position espoused by an enlightened few is to be ignored. It is not. In all societies, in all ages, the ideas of those in a minority have influenced and inspired those in the majority. But this describes the legislative process, not the judicial. Only when a minority opinion has gradually made its way to acceptance by the society can we be sure that it was and is the enlightened view and not merely an unpopular and unpersuasive opinion. If judges anticipate the moral verdict of society, they will frequently anticipate incorrectly and fasten their own views upon the nation in the name of enlightenment. Such a theory of judicial power resembles too closely Rousseau's concept of the general will, which is entitled to govern even when possessed only by a minority, and is antithetical to the tenets of representative democracies. If, as the Eighth Amendment contemplates, the people are to give their verdict of what is cruel and unusual, the people -- through their elected representatives -- must sit in judgment.

The result of Solicitor General Bork's arguments is of course well known. In Gregg v. Georgia, 428 U.S.153 (1976), and its companion cases, the Supreme Court held by a margin of 7 to 2 that the death penalty does not violate the Constitution. The opinions of the Justices in the majority reflect the position and arguments set forth for the United States by Solicitor General Bork.

I would like to close on two notes. First, Judge Bork would make the kind of Justice that advocates in the Supreme Court should welcome. I have been practicing before the Supreme Court for 17 years. The qualities any advocate wants in a Justice are the antithesis of "predictability." We want neutrality, open-mindedness and the willingness to be persuaded by reasoning and argument. The late Justice Potter Stewart was such a Justice and when the Bar of the Supreme Court met to honor his memory, the words of another "distinguished jurist" were quoted to describe Justice Stewart's approach to judging. That distinguished jurist was Judge Robert Bork and Judge Bork's words bear repeating here: the "abstinence from giving his own desires free play, [the] continuing and self-conscious renunciation of the power, that is the morality of the jurist." Bork, Tradition and Morality in Consitutional Law, p. 11 (1984).

Finally, I urge the Committee to consider and evaluate Judge Bork in the spirit in which the Framers created the Constitution. As Judge Friendly wrote,[2] the Constitution demands, modestly but insistently, "a spirit of moderation, of compromise, and of placing the public good above private ends." Judge Henry J. Friendly, The Constitution, in Equal Justice Under Law, at p. 19 (Dep't of Justice Bicentennial Lecture Series 1976). That is the spirit in which Judge Bork appeared before this Committee. It is now for the Committee and for the full Senate to show the people of America and the historians of tomorrow that it too _shares the same abiding spirit.

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[2] I cannot resist a digression here. Judge Bork has been disparaged for his critique of the Supreme Court's decision in Shelly v. Kraemer, 334 U.S. 1 (1948). He was scarcely alone. Among the scholarly works on this subject, Judge Friendly's analysis of the case is worthy of the Committee's consideration and I have included it as an attachment to this statement.

Henry J. Friendly, The Dartmouth College Case and the Public-Private Penumbra, pp. 14-18 (1968) (footnotes omitted):

* * * *

The view that the Fourteenth Amendment may have some such sweep stems from what has been called the "portentous decision" twenty years ago in Shelley v. Kraemer, or, more accurately, from attempts to supply a reasoned basis for it. The holding, that the equal protection clause of the Fourteenth Amendment prohibited a state court's allowing the beneficiary of a covenant restricting against the sale of large tracts of real property to Negroes to prevent the taking of possession by a Negro who had bought a lot from a willing white seller, does not now seem very "portentous"; indeed, today one can hardly imagine the case having been decided otherwise. Almost no one disagrees with the result of Shelley v. Kraemer; yet despite the quantity and quality of scholarly writing, the attempt to extract a satisfying general principle for it has run into the gravest difficulties and seems to lead inescapably to the great blue yonder.

One point on which there is general agreement is that the opinion, by Chief Justice Vinson, gives little help. After characterizing the Civil Rights Cases as holding "that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States" and that the Amendment "erects no shield against merely private conduct, however discriminatory or wrongful," and saying "that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed" by the Amendment, he added that "here there was more." The "more" was "judicial enforcement by state courts of the restrictive terms of the agreements." The discovery was followed by an extensive and convincing demonstration that "from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials." What the demonstration unfortunately did not demonstrate was the only point at issue: namely, that the Court had ever so held with respect to action of a state court that simply enforced a private agreement which the opinion, perhaps in error, conceded to be valid.

By all odds the most influential criticism of this fallacy is Professor Herbert Wechsler's Holmes Lecture of 1959 at the Harvard Law School, which sparked a discussion that continues with unabated fury. While he propounded searching questions as to the implications of Shelley v. Kraemer in other areas, enough for our purposes can be asked about restrictive covenants themselves. We have learned that a state violates the Fourteenth Amendment if it awards damages to beneficiaries of a racially restrictive covenant against a covenanter who breaks it, although the author of the Shelley opinion disagreed. Suppose a prospective vendor sued under a declaratory judgment statute for a decree that he might sell or a purchaser sued for a declaration that he might buy free of a covenant restricting against sale to a particular minority group, and a state court declined to grant relief, saying it did not propose to give legal advice on this issue although it had done so on similar ones. Does anyone doubt that the Supreme Court would reverse, although here the state has simply abstained? Suppose an action to enforce such a covenant was brought in a federal court on the basis of diverse citizenship. Here there would have been no action by a state court, yet it would be a foolish prophet who would think the result would differ, or should. Indeed the companion case of Hurd v. Hodge reached a similar result as to a restrictive covenant in the District of Columbia. The Court's explanation of Shelley v. Kraemer thus simply will not wash even in the area of restrictive covenants, let alone as to other problems that have arisen. The trouble was not simply the Missouri and Michigan courts' decrees; it was the Missouri and Michigan common law which made the covenants valid and enforceable.

Professor Wechsler's challenge speedily elicited an attempt at principled elucidation of Shelley by Professor, now Dean, Louis Pollak. His thesis was that the line that cannot be crossed by the state "is that beyond which the state assists a private person in seeing to it that others behave in a fashion which the state could not itself have ordained." Shelley thus rested on the state's having allowed a third party to upset a consensual transaction between two others on a ground not permitted to the state itself. This principle neatly explained the failure of the Court to intervene in such cases as Rice v. Sioux City Memorial Park Cemetery and Black v. Cutter Laboratories on the basis that there the state had merely declined to invalidate provisions in contracts between the parties, although it could not constitutionally have made such contracts on its own. Similarly his formulation supported the first denial of certiorari after the substitution of private trustees in the Girard College case, although state action would have existed if the trustees had wished to abandon Girard's restrictions and the Pennsylvania courts had forbidden. Yet this position led Dean Pollak to reject a well-known Massachusetts decision, Gordon v. Gordon, upholding a testator's direction for forfeiture of a legacy in the event of his son's marriage outside the Jewish faith, unless "the state has power to inhibit -- perhaps to prohibit altogether -- miscegenation of Jews and others," which it rather obviously does not. I am not certain Dean Pollak was required to go so far; conceding that Massachusetts was engaging in state action, one could justify the decision on the lack of any public consequences sufficiently material to warrant disregard of the testator's desires. Despite the elegance of Dean Pollak's thesis and its initial appeal, it has generally been regarded as turning too largely on the accident of how a case arises and thus failing to supply a truly satisfying principle.

Another notable attempt to fill the jurisprudential vacuum was Professor Louis Henkin's article three years later, "Shelley v. Kraemer: Notes for a Revised Opinion." He took a far more sweeping approach than Dean Pollak, expressing favor for a principle foreshadowed by a pre-Shelley decision reversing an Illinois injunction against peaceful picketing on the basis that the prohibited state action was not the court's decree but the Illinois common law that led to it. Correctly, in my view, this "puts the common law of a state generally on the same footing as its legislation, rejects distinction between the written law and the unwritten, and makes the state responsible for both." What is not clear to me is where Professor Henkin's approach falls short, as he thinks it does, of the extreme position that the state's maintenance of any rule of law as to private conduct, whether a rule of interference or a rule of noninterference, constitutes state action, save for noninterference in the narrow area where the state could not constitutionally interfere, and, if so, what the basis is for the short-fall. What concerns me more are suggestions in the article that seem to identify this narrow area where state inaction is not state action because the state could not constitutionally act with what is constitutionally permissible, at least as regards discrimination. I cannot believe this is so. Although the state may not be able to punish a householder who expels a Negro from a party in his home to which all white residents of the neighborhood have been invited, I doubt it is constitutionally required to dispatch the police to aid him in the effort. Yet it is surely free to send the police if it chooses and, if I read Professor Henkin aright, the fact that the state can constitutionally choose causes this not merely to be state action, which it clearly is, but unconstitutional action, which I think it is not -- since any such view would place a premium on self-help. Again, the fact that Massachusetts could have refused to enforce the forfeiture in Gordon's will for marriage outside his faith does not make inevitable a conclusion that enforcement of the will was unconstitutional.

If anyone thinks I imagine that by venturing to disagree with these respected scholars I have solved the puzzle of Shelley v. Kraemer, he has another think coming. Perhaps indeed there is no logical stopping place short of the extreme position that whenever a state has exercised an option to enforce or refuse to prevent individual action which would violate the Fourteenth

Amendment if taken by the state itself, there is state action, although not necessarily unconstitutional state action. For the Supreme Court to affirm this would not require it to overrule the Civil Rights Cases; these could be rested on the basis for which, as indicated, there is support in Mr. Justice Bradley's opinion -- that Congress can act to enforce the Fourteenth Amendment only when there is ground for thinking a state would violate it either by action or by inaction.

I cannot held shuddering, however, at all the implications of this extreme position. It would mean mounting dockets for the Supreme Court and other courts, especially for lower federal courts in suits under the civil rights statutes. Many of these action would relate to petty grievances not worthy of judicial consideration; academic writers tend to concentrate on meritorious claims without sufficient regard for the judicial burden in sorting them out. Other actions would involve more important policies which, although of dubious wisdom, were not dubious enough to be unconstitutional, yet where a decision of lack of unconstitutionally might be taken as "legitimating" a practice that was far from being approved. Of equal concern are the temptations afforded by difficult cases to intrude on constitutional grounds into areas best left to the legislature, the difficulties of limiting such decisions to the facts that gave them birth, and the consequent increases in actual or potential federal-state collisions. The courts lack the time, the empirical knowledge, and the wisdom to handle every claim of unequal or arbitrary treatment by individuals enforced or not prevented by the states. Recognizing that the difference between a view allowing Fourteenth Amendment attack on any decision to enforce or not to enforce a rule of law but giving fairly wide latitude to the states in the area of nonenforcement and the position that some "significant state involvement" is a precondition to such attack is only "one of emphasis" which is "slight and subtle," Professor Lewis persuasively argues "that the differences in operation and effect of the analyses, in the acceptableness of the decisions reached through their use and in the responses of the various organs making up the federal totality to results of the two analyses, may be marked." However this may be, what is always vital to remember is that it is the state's conduct, whether action or inaction, not the private conduct, that gives rise to constitutional attack; it still cannot be doubted that the Fourteenth Amendment was designed to protect the citizen against government and not against other citizens. Decision of actual controversies thus is not helped overmuch by first making an exceedingly broad proclamation as to what constitutes state action and then limiting the vision to racial discrimination, and even as to that only with respect to "salient aspects of the public life" without defining what life is public or what aspects are salient, or by saying this is subject to "a prudent use . . . of the resources of law to afford 'protection'" without indicating what that may be. In the Supreme Court's recent opinion holding the refusal of a subdivider to sell a residential lot to a Negro to be unlawful, the placing of decision on the first section of the Civil Rights Act of 1866, which was considered to be within the power granted Congress by Section Two of the Thirteenth Amendment without regard to state action, avoided any need to reconsider that thorny subject.

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The CHAIRMAN. Thank you, Mr. Randolph.

Ms. LaFontant.

TESTIMONY OF JEWEL LaFONTANT

Ms. LAFONTANT. Good afternoon, Mr. Chairman and members of the committee.

Judge Bork has asked me to appear on his behalf. I have reviewed most of the relevant court cases; I have read his writings; and I have watched and listened to his testimony as well as that of many witnesses who have appeared before you. There has been a thorough discussion of the cases in which he has been involved and an unending criticism of much of his writings. I must say that I don't recognize the Judge Bork I know from so much of what has been said by his opponents here.

You see, I knew him well. Let me tell you about the heart of the man. In 1973 after I left the United Nations, I came to the Office of the Solicitor General. I was a rarity, if not an oddity: there never had been a woman, black or white, Deputy Solicitor General of these United States. And my presence here is due to the high regard I have for Judge Bork, based upon my personal experiences with him.

Judge Bork placed me in charge of the entire Civil Division where I reviewed hundreds and hundreds of cases that had been determined first in the U.S. district courts and then in the U.S. courts of appeal. I say I was an oddity—and it's not just my assessment; it appeared that there was also the perception of the staff in the offices of the SG. You see, attempts were made to isolate me. On one occasion, a secretary who had warmed up to me after a few months after my arrival, she said: I am going to tell you something, Mrs. LaFontant, that you are not going to like—the other deputies meet regularly, and you are not included. How do you know this, I asked. She continued: I was told to call the deputies in to a meeting and the names were called, and I said: "And Mrs. LaFontant?" The response was: oh, no, just the men. The response could have been: oh, no, just the whites.

I immediately reported this to Solicitor General Bork, and it is an understatement to say that he was appalled. And though he is usually a calm and even-tempered person, he exhibited strongly his dismay and sputtered his unhappiness about this attempt to exclude me and to discriminate against me. The very next day was the beginning of my attending so many briefings—I was bombarded with meetings—that I wondered to myself whether I had been wise in complaining in the first place.

But those meetings were very important, not only because the current cases were discussed, the relevant law reviewed, but the cases for argument before the Supreme Court were assigned at those meetings, and those in charge of assigning have the pick of the cases to present to the various lawyers.

By being kept out of these discussions, my education of course was being limited, to say the least, and I was not given the choice cases to argue.

But Judge Bork handled this in his usual low key, quiet but determined and fair manner—no confrontation, no embarrassing accusations—things just changed. He had seen to it that I was treated the same as the others.

And during my entire tenure there, Judge Bork exhibited complete fairness and openness. He was always open for debate—actually enjoyed the give and take of debate. He believes, and has said: intellect and discussion matter, and can change the world. He doesn't have a closed mind.

Bob Bork's devotion to women's rights was further exhibited in his support of the Federal Women's Program of the entire Department of Justice. In fact, the Federal Women's Program was founded in my quarters of the Solicitor General's Office, and I became its first chair, which could not have happened without the blessing and encouragement of Judge Bork.

The purpose of the Federal Women's Program was the elimination of sexism, to enlarge the recruitment and promotion of women. It seemed there was an invisible ceiling at about grade 12 for women when I was here. Our group studied and tracked women and men from their entry into the Department and throughout their careers, and found that women with the same or similar credentials as men could not rise above grade 12. We sensitized, through written and verbal contact, the department heads to the discrimination against women at the Department of Justice, and held what was called "women's exposition" at the Justice Department each year for several days, and included all agencies of government and even the surrounding business and civic community. We put in place programs to combat the sexism that was rampant. Our efforts played no small role in opening the doors of opportunity for women and improving the status of women. We take some credit for increasing the number of female employees, as well as an improvement in their overall distribution to more responsible positions.

I do believe that Bob Bork, by putting the weight of his office behind this program, caused the department heads to sit up and take notice.

All of my life I have been involved in civil rights organizations, having served for many years as secretary of the Chicago branch of the NAACP, on the board of directors of the American Civil Liberties Union and its legal redress committee, and as chairman of the Illinois Advisory Committee of the U.S. Civil Rights Commission, as well as being a commissioner of the Martin Luther King Holiday Commission. I have no hesitancy in supporting Judge Bork's nomination to the Supreme Court.

Not only is he a supporter of equal treatment for women. I sincerely believe that he is devoid of racial prejudice, or else I would not be here.

But what I like about him further is that he can be persuaded. In his 1963 New Republic article, he opposed the public accommodations provision of the proposed 1964 Civil Rights Act, but 10 years afterwards, in 1973, while I was in the Solicitor General's Office, he changed his mind. He admitted he was wrong, and he has been severely criticized for his change of heart. To me that is a sign of true intellect, that you can admit you made a mistake. Bork said: "I was on the wrong track, the civil rights statute has worked very well. Were it to be proposed today . . ."—and he was talking in 1973—"I would support it."

Judge Bork's commitment to and great and unusual respect for precedent was made clear to me when he was Solicitor General. He preached the importance of the stability of the law. He stated at these hearings that he would respect precedent. I believe him.

When he states he now accepts *Brandenburg,* I believe him. Recently I asked Judge Bork a question: Is a case that was decided by a 5-to-4 vote, such as *Roe* v. *Wade,* just as much a precedent as one that was determined by a 9-to-0 vote? His response was: you bet you. He is no ideologue, but an objective clearthinking jurist who, in spite of his difference with the rationale of *Roe* v. *Wade,* testified along with Archibald Cox against the pro-life bill, or the human life bill proposal that would have made abortion murder, as defining life as beginning at conception.

But no matter how well you know a person, in evaluating the judicial competency and suitability of one who is being considered for appointment to the Supreme Court, there is no looking glass into which we can gaze and with accuracy and credibility determine or predict with certainty how an Associate Justice will perform, reason, decide, and vote in the abstract. The Justices, as I understand the situation, decide cases on the basis of the facts before them, the nuances of the circumstances, and the controlling precedent.

Indeed, no attempt should be made to really obtain prior commitments as to how he will vote. It's inappropriate to attempt to fetter the judicial freedom of a jurist by seeking or demanding to know how he will decide issues and cases in the future.

I see that my time is up. I have submitted a paper. I'd like at this time to say thank you very much, and I am open to questions.

[Statement follows:]

REMARKS OF JEWEL S. LAFONTANT
RE JUDGE ROBERT BORK
BEFORE THE UNITED STATES SENATE JUDICIARY COMMITTEE
SEPTEMBER 28, 1987

Mr. Chairman, Members of the Committee, my name is Jewel Lafontant. I am a senior partner in the Chicago based law firm of Vedder, Price, Kaufman & Kammholz, with offices also in New York and Washington, D.C.

Judge Bork has asked me to appear on his behalf. I have reviewed most of the relevant court cases. Have read Judge Bork's writings and have watched and listened to his testimony as well as that of many witnesses who have appeared before you.

There has been a thorough discussion of the cases in which he has been involved and an unending criticism of much of his writings.

I must say that I do not recognize the Judge Bork I know from so much of what has been said by his opponents. I knew him well.

Let me tell you about the heart of the man.

In 1973 I was a rarity, if not an oddity, in the Solicitor General's Office. You see, there never had been a woman, black or white, Deputy Solicitor General. My presence here is due to the high regard I have for Judge Bork based upon my personal experiences with him. Judge Bork gave me the opportunity to represent our Government before the United States Supreme Court. He placed me in charge of the entire Civil Division where I reviewed hundreds and hundreds of cases that had been determined first in the U.S. District Courts and then in the U.S. courts of appeal. I say I was an oddity - not only my assessment - and it appeared that that was the perception of the staff in the offices. You see, attempts were made to isolate me. On one occasion a secretary who had warmed up to me — a few months after my arrival — said, "I am going to tell you something, Mrs. Lafontant, that you are not going to like. The other deputies meet regularly and you are not included." "How do you know this", I asked. She continued, "I was told to call the deputies into a meeting and the names were called and I said 'and Mrs. Lafontant'." "Oh no, just the men" was the response. I immediately reported this to Solicitor General Bork. It is an understatement to say that he was appalled. And, though he is a calm and even tempered person he exhibited strongly his dismay and sputtered his unhappiness about this attempt to exclude me and to discriminate against me. The very next day was the beginning of my attending so many briefings -- I was bombarded with meetings -- that I wondered to myself whether I had been wise in complaining in the first place. Those meetings were very important not only because the current cases were discussed; the relevant law reviewed but the cases for argument before the Supreme Court were assigned at those meetings and those in charge of assigning had the "pick" of the cases to present to the various lawyers. By being kept out of these discussions, my education was being limited -- to say the least -- and I was not given the choice cases to argue. Judge Bork handled this in his usual low key, quiet, but determined and fair manner. No confrontation -- no embarrassing accusations. Things just changed! He had seen to it that I was treated the same as the others.

During my entire tenure there, Judge Bork exhibited complete fairness and openness. He was always open for debate -- actually enjoyed the give and take of debate -- he believes and has said "intellect and discussion matter and can change the world." He does not have a closed mind.

Bob Bork's devotion to women's rights was further exhibited in his support of the Federal Women's Program of the Department of Justice. In fact the Federal Women's Program was founded in my quarters of the Solicitor General's Office and I became its first Chair which could not have happened without the blessing and encouragement of Judge Bork.

The purpose of FWP was the elimination of sexism to enlarge the recruitment and promotion of women. There was an invisible ceiling at about grade 12 for women. Our group studied and tracked women and men from their entry into the Department and throughout their career -- and found that, women with the same or similar credentials as men -- could not rise above grade 12. We sensitized -- through written and verbal contact -- the department heads to the discrimination against women at the Department of Justice and held what was called Women's Expo at the Justice Department each year for several days -- and included all agencies of government and even the surrounding business and civic community. We put in place programs to combat the sexism that was rampant. Our efforts played no small role in opening the doors of opportunity for women and improving the status of women. We take some credit for increasing the number of female employees as well as an improvement in their overall distribution to more responsible positions.

All of my adult life I have been active in civil rights organizations. Having served for many years as Secretary to the Chicago Branch of the NAACP, on the Board of Directors of the American Civil Liberties Union and its Legal Redress Committee and as Chairman of the Illinois Advisory Committee of the U.S. Civil Rights Commission, and being a Commissioner of the Martin Luther King Holiday Commission, I have no hesitancy in supporting Judge Bork's nomination to the Supreme Court.

Not only is he a supporter of equal treatment for women, I sincerely believe that he is devoid of racial prejudice. Further, what I like about him is that he can be persuaded. In his 1963 New Republic Article he opposed the Public Accommodations provisions of its proposed 1964 Civil Rights Act. Ten years after the New Republic Article, in 1973, while I was in the Solicitor General's Office, he changed his mind. He admitted he was wrong. He has been severely criticized for his change of heart. To me, that is a sign of true intellect — that you can admit you have made a mistake. Bork said, "I was on the wrong track." The Civil Rights statute has worked very well -- were it to be proposed today (1973) I would support it.

Judge Bork's commitment to and great and unusual respect for precedent was made clear to me when he was Solicitor General. He preached the importance of the stability of the law. He stated at these hearings that he would respect precedent. I believe him. When he states he now accepts Brandenberg, I believe him. Recently, I asked Judge Bork a question, "Is a case that was decided by a 5 to 4 vote (such as Roe v. Wade) just as much a precedent as one that was determined by a 9-0 vote." His response was, "You betcha!"

He is no idealogue -- but an objective, clear thinking jurist who in spite of his difference with the rationale of Roe v. Wade testified along with Archibald Cox against the Pro-Life Bill or, "Human Life Bill -- proposal that would have made abortion murder as defining life as beginning at conception."

No matter how well you believe you know a person, in evaluating the judicial competency and suitability of one who is being considered for appointment to the Supreme Court, there is no looking glass into which one can gaze and with accuracy and credibility determine or predict with certainty how an associate justice will perform, reason, decide and vote -- in the abstract. Judges, as I understand the situation, decide cases on the basis of the facts before them, the nuances of the circumstances and the controlling precedent.

Indeed, no attempt should be made to obtain prior commitments as to how he will vote, or a fortiorari, it is inappropriate to attempt to fetter the judicial freedom of a jurist by seeking or demanding to know how he will decide issues and cases in the future.

There is a notable situation involving the great controversy and debates which arose during confrontation hearings of the nomination of Mr. Justice Hugo Black to the Supreme Court in 1935. Before the hearings, it was widely published and disseminated that Hugo Black in early life, while an elected official in the political life of Alabama, had been a member of the Ku Klux Klan. When confronted with this allegation, he admitted indeed, he had been a member of the Klan. Justifiably, the Black Community was seriously and appropriately concerned about a former member of the Klan becoming a member of the Supreme Court of the United States.

In spite of his prior Klan membership, Mr. Justice Black was confirmed. Mr. Justice Black, the former Alabama Senator and former KKK member -- when confirmed and sitting, became a champion of the rights and interests of the oppressed and down trodden and especially of the Black citizens of the United States.

Justice Black's opinions were and are among the most liberating in bringing -- by judicial emancipations -- Blacks into the mainstream of the American society and releasing them from the shackles and servitudes of an unsavory history and period of segregation and discrimination.

It is certainly within the realm of probability that, when confirmed, Mr. Justice Bork could very well emulate the distinguished and liberating career of Mr. Justice Black.

As a woman — and a black woman — I have no fear of entrusting my rights and my privileges to Robert Bork as an Associate Justice of the Supreme Court. I believe him.

I ask this committee and the Senate, without reservation, to give this learned jurist, this legal scholar and philosopher, this craftsman of jurisprudence, this man with heart, an opportunity to serve on the highest court.

Thank you.

Senator HUMPHREY. Ms. LaFontant, if you are nearly finished, why don't you go ahead and complete your statement, if you wish?

Ms. LAFONTANT. Well, there is a notable situation involving the great controversy and debates—I should say thank you very much—there is a notable situation involving the great controversy and debates which arose during confirmation hearings of the nomination of Mr. Justice Hugo Black to the Supreme Court in 1935.

Before the hearings, it was widely published and disseminated that Hugo Black in early life, while an elected official in the political life of Alabama, had been a member of the Ku Klux Klan. When confronted with this allegation, he admitted indeed he had been a member of the Klan. Justifiably, the black community, fairminded people, were seriously and appropriately concerned about a former member of the Klan becoming a member of the Supreme Court of the United States.

In spite of his prior Klan membership, he was confirmed. And Mr. Justice Black, the former Alabama Senator and former KKK member, once confirmed and sitting, became a champion of the rights and interests of the oppressed and downtrodden and especially of the black citizens of the United States.

Justice Black's opinions were and are among the most liberating in bringing blacks into the mainstream of the American society and releasing them from the shackles and servitudes of an unsavory history and period of segregation and discrimination.

It is certainly within the realm of probability that when confirmed, Mr. Justice Bork could very well emulate the distinguished and liberating career of Mr. Justice Black.

As a woman and a black woman, I have no fear of entrusting my rights and my privileges to Robert Bork as an Associate Judge of the Supreme Court. I believe in him.

I ask this committee and the Senate without reservation to give this learned jurist, this legal scholar and philosopher, this craftsman of jurisprudence, this man with heart, an opportunity to serve on the highest Court.

Thank you very much.

Senator SPECTER. You have arrived at a time which may be less desirable than 10 o'clock at night; you have arrived over the lunch hour. And I just stepped out for a brief bite. It is perhaps an opportunity for Senator Humphrey and myself to make a motion and to decide what the committee will do here in the absence——

Senator HUMPHREY. I am delighted, whatever it is.

Senator SPECTER [continuing]. In the absence of the chairman or anybody from the other side of the aisle.

Well, Mr. Smith, it is your turn.

TESTIMONY OF STUART SMITH

Mr. SMITH. Mr. Chairman and members of the committee, my name is Stuart A. Smith. I am a partner in the New York City law firm of Shea and Gould, and I have practiced there for 4 years. Before that, I served for 10 years as tax assistant to the Solicitor General, under three different Solicitors General, including both Republican and Democratic administrations, including the entire tenure of Robert Bork.

During my time at the Department of Justice, I argued almost 50 cases in the Supreme Court and more than 60 cases in the various circuit courts of appeals. I have worked with many fine lawyers over a very productive professional career, both in government and in private practice, but I can tell the committee that I have never encountered anyone who has been the equal of Bob Bork in terms of his intellectual integrity and absolute professionalism.

As Mr. Randolph adverted to, the Solicitor Generalship is perhaps the best preparation a lawyer can have for service on our nation's highest Court. He has been aptly called the 10th Justice, and he has enormous authority and independence to influence both the docket of the Court and how the Court decides cases, because the Court relies on the Office of the Solicitor General.

Bob Bork presided over the Office of the Solicitor General during his time, 1973 through 1977, with an intellectual honesty that the Court deeply appreciated. This quality of intellectual honesty coupled with his profound respect for the rights of individuals convinces me that he would make an outstanding Justice.

I would like to tell the committee about three instances in which I was personally involved, which I believe serve to illustrate the nature of his character and capacity.

There are many occurrences in which the tax law and civil rights or civil liberties laws intersect. In these instances, which were within my special responsibility in the Solicitor General's Office, Judge Bork consistently demonstrated his commitment that all persons subject to our tax system be treated with absolute fairness.

One of those instances, Senator Humphrey has mentioned last week, but I think it deserves repetition. In 1976, a black man in Alabama had been convicted of various drug and criminal income tax charges. In his petition for Supreme Court review, the defendant claimed that the Government's principal witness had perjured himself. I had been asked by the defendant's lawyer to undertake an independent investigation of this matter, and I was happy to do it. It was something that Judge Bork encouraged, that the Government had to behave in an absolutely right-minded way in the conduct of criminal prosecutions, including the tax prosecutions of which I was in charge.

I directed that independent evaluation, and that, believe me, took a good deal of time. We had to delve into the records of the Drug Enforcement Administration, and it was not easy to extricate this information. Ultimately, we did, and I recommended to Judge Bork that we confess error and ask the Supreme Court to return that case to the court of appeals to consider whether the conviction should be reversed.

Judge Bork unhesitatingly agreed with my recommendation. Now, in doing that, I want to make it perfectly clear that it was his responsibility to do that. Last week, I think the committee heard some testimony that in connection with various instances in which Judge Bork conducted himself with exemplary fairness, Mr. Coleman, I think, told the committee, "Oh, that was so-and-so, or that was so-and-so; that was not Robert Bork." That is, with all due respect, arrant nonsense. That is not the way the Solicitor General's Office behaved. It is not the way any chain of command behaves. I made the recommendation, but it was Robert Bork who ultimately made the decision, for which he can take credit or possibly blame.

He took this principled action, in my view, over the strong protest of the local U.S. attorney, who had inundated me and various other lawyers in the Department with all sorts of pressure to keep that conviction intact. And we did not do so because, as I said, we felt ourselves bound by a stricter standard of conduct, a standard of conduct that Judge Bork encouraged. He brought out the best of all of the lawyers in the Office.

A lesser man could have yielded to institutional pressures, but that was not the course Robert Bork could have followed.

Sometimes, the actions of the Solicitor General in declining to proceed with a case likewise illustrate his compassion and respect for individual rights and civil liberties. These actions are unheralded and are only known to those lawyers in the Office who are close to the particular case. I would like to describe such a case to the committee.

The CHAIRMAN. Your time is up, sir, so if you could summarize, we would appreciate it.

Mr. SMITH. Well, I think it is important, and I will be as brief as I can.

In 1974——

The CHAIRMAN. Very brief.

Mr. SMITH [continuing]. A Quaker was convicted of filing a false W-4 Form, claiming an excessive number of exemptions, for the purpose of making an anti-war protest. The court of appeals reversed his conviction, and it fell to us to figure out whether to appeal the case to the Supreme Court. There were conflicts in the lower courts, and there was a respectable position to take that case forward.

I recommended again to the Solicitor General that we not take the case forward, and he agreed with my recommendation. He understood that the defendant's behavior represented something akin to what I would call sincerely-motivated conduct which is deeply rooted in our culture and history.

Again, here is a situation in which Judge Bork was not dealing in legal abstractions, but rather with wisdom and compassion in connection with the facts of a particular case.

I think that these instances, plus a third one which I have mentioned in my prepared paper which is going to be part of the record, indicate to me that Judge Bork is a person open to persuasion; he is open to argument. In my view there is no doubt, as someone who has studied the process of Supreme Court litigation and who has been very close to this man over 4 years, that he would grace the work of our nation's highest tribunal, and I urge his speedy confirmation.

The CHAIRMAN. Thank you, Mr. Smith, for abbreviating your statement, and your entire statement will be placed in the record as if read.

[Statement of Mr. Stuart Smith follows:]

STATEMENT OF STUART A. SMITH

Mr. Chairman and Members of the Committee:

My name is Stuart Smith. I am a partner in the New York City law firm of Shea & Gould, where I have practiced for the last four years. Before that, I was the Tax Assistant to the Solicitor General. I served for ten years under three different Solicitors General, during both Democratic and Republic Administrations, including the entire tenure of Robert Bork.

During my time at the Department of Justice, I argued more than 50 cases in the United States Supreme Court and at least another 60 in the courts of appeals. I have worked with many fine lawyers, both in government and private practice, but I have never encountered anyone who has been the equal of Bob Bork, in terms of his intellectual integrity and absolute professionalism.

The Solicitor Generalship is perhaps the best preparation a lawyer can have for service on the Supreme Court. A person's conduct in that important post is a reliable indication as to how he would perform on the Supreme Court. Bob Bork presided over the Office of the Solicitor General with an intellectual honesty that the Court deeply appreciated. This quality of intellectual honesty, coupled with his profound respect for precedent and the rights of individuals, convinces me that he would make an outstanding Justice.

Three instances, in which I was personally involved, will serve to illustrate the nature of his character and capacity.

There are occurrences in which the tax law and civil rights laws intersect. In these instances, which were within my special responsibility, Judge Bork consistently demonstrated his commitment that all persons subject to our tax system be treated with absolute fairness. In 1976, a black man had been convicted in a southern state of various drug and criminal income tax charges. In his petition for Supreme Court review, the defendant claimed that the government's principal witness had committed perjury. As the lawyer responsible for presenting the government's tax cases to the Supreme Court, I directed that an independent evaluation be made, and concluded that the defendant's claim was factually correct. Accordingly, I recommended to Judge Bork that the government confess error and ask the Supreme Court to return the case to the court of appeals to consider whether the conviction should be reversed.

Judge Bork unhesitatingly agreed with my recommendation. He took this principled action despite the strong protests of the local United States Attorney and other lawyers in the Department of Justice. But Judge Bork understood that the government was bound by a stricter standard of conduct. As he properly saw the matter, the government's criminal prosecutions had to be conducted with the utmost fairness and the government owed a special obligation to the Supreme Court to admit when the process had been defective, whatever the costs might be. A lesser man might have yielded to the institutional pressures and deprived a black man of his fundamental right to a fair trial in order to protect the reputation of another federal officer. For Robert Bork, that was an impossible course to follow.

Sometimes the actions of a Solicitor General in declining to proceed with a case likewise illustrate his compassion and respect for individual rights and civil liberties. These actions are unheralded and are only known to those lawyers in the office who are close to the particular matter.

I would like to describe one such case to the Committee. In 1974, a federal district court convicted a Quaker teacher of filing a false tax withholding form claiming an excessive number of dependents. The teacher had filed the false form because of his opposition to defense spending by the government. During the trial, the defendant refused to stand up when the trial judge entered the courtroom, and the judge had also found him guilty of contempt.

In reviewing the convictions for both the tax offense and the contempt actions, the court of appeals issued an opinion that conflicted on both issues with the decision of another circuit. Because one of the principal functions of the Supreme Court is to resolve conflicts between circuits, there was considerable pressure within the government for taking the case to the Supreme Court. Indeed, the local United States Attorney made a special trip to Washington to urge us to appeal to the Supreme Court.

After careful consideration, Judge Bork agreed with my recommendation not to pursue the case any further. As a purely analytical matter, we both regarded the reasoning of the court of appeals to be vulnerable. Hence, we believed that if we took the case to the Supreme Court, there was a strong likelihood that we, in fact, would have prevailed and gotten the convictions reinstated. But Judge Bork was persuaded by my argument that the case was an aberration that would not threaten the government's criminal tax prosecutions. Rather, he recognized the human aspects of the case -- in which a person would have been sentenced to a substantial prison term for sincerely-motivated conduct that has deep roots in our history and culture. Thus Judge Bork concluded that it would have been inappropriate, indeed, inhumane to press on with such a case.

Finally, a third episode illustrates Bob Bork's absolute intellectual integrity and commitment to the process of honest and forthright debate -- a characteristic that the Committee observed throughout last week's proceedings. In 1974, a suit was brought by an anti-war group to challenge the practice whereby members of Congress served in the armed forces reserves. The Solicitor General successfully opposed the suit on various grounds, including "justiciability" -- a doctrine that permits the courts to dismiss cases that are not suitable for judicial resolution. Here, the claim of justiciability relied upon the constitutional doctrine of separation of powers -- that each house of Congress is to regulate the practices of its members, rather than having those practices regulated by a coordinate branch of government, such as the courts.

When Bork advanced the Government's justiciability point before the Court, Justice William O. Douglas, who rarely spoke, challenged the argument. He asked whether, in the government's view, a suit to recover back pay by a member of Congress who was dismissed from the reserves would also be nonjusticiable given the fact that suits for back pay are routinely handled by the federal courts.

Before Bork could answer, another Justice observed that there was no evidence that a back pay claim had been filed in this particular case. The Solicitor General agreed but rejected this easy way out of what was a difficult question. He went on to state that Justice Douglas's question "properly tests the limits of our theory." He then answered the question.

I no longer recall the substance of the answer, but I do recall the nature of the process: two powerful minds engaging in a demanding exchange in which each rejected a simple solution and acknowledged and responded to an opposing point of view with unfailing candor and courtesy. A man less concerned with the pursuit of the truth, less committed to his obligation to help the Court reach the legally correct decision, and more concerned -- as sometimes lawyers are -- simply with winning a case, would have avoided such a question.

It is fortunate when a person of Judge Bork's proven ability comes to national prominence. It is even more fortunate when a person of Judge Bork's professionalism does -- a professionalism that guides him always, when dealing with the powerful and the powerless, to act with the utmost honesty and responsibility. Judge Bork would enhance, indeed grace, the important work of our nation's highest tribunal. I urge this Committee, and the Senate, to act speedily to confirm his nomination.

The **CHAIRMAN**. Senator Specter.

Senator **SPECTER**. Thank you very much, Mr. Chairman.

This panel has a very strong Pennsylvania representation—our former Governor and a member of Pepper, Hamilton & Sheetz.

Let me start with you, Governor Thornburgh. You served with Judge Bork, as your written testimony shows—and I am sorry that I missed the testimony earlier, but I just stepped out for a brief bite over the lunch hour—did any of your experiences with Judge Bork give you any insights on the civil rights issue? I know how deeply committed you are on that subject, and I would be interested to know, and I think my colleagues would be, too, as to what you gleaned by way of a sense of Judge Bork's attitude on the civil rights issue.

Mr. **THORNBURGH**. This was a very unique time for the Department of Justice, Senator Specter, because of the fact that when Attorney General Levi took office, he make it a prime priority to restore the effectiveness of the Department of Justice as a Department of Justice. A lot of our time during my tenure there was spent on reexamining some of the violations of civil rights and civil liberties that were alleged to have taken place during the Watergate era and previous thereto in terms of whether federal criminal prosecutions should be brought and could be sustained.

In the Department during that period of time, a working group consisting of the Attorney General, Edward Levi, the Deputy Attorney General, Harold Tyler, now Supreme Court Justice Scalia, Judge Bork, the Solicitor General, and myself as head of the Criminal Division, spent a considerable amount of time looking at facts that had been developed by the Rockefeller commission and during the hearings of the Church committee in this body, and at some of the matters that had been disclosed respecting break-ins, mail openings, the Co-Intel-Pro operation, and all of the aftermath of that unhappy period.

During that 2-year interval in which I served as head of the Criminal Division, we were in frequent contact with regard to our concerns about constitutional rights being observed and the civil rights and civil liberties of people, including unpopular groups that were the target of many of these particular operations. And there was a mutual concern that never again should these types of activities be countenanced by our Government. And out of that came recommendations in coordination with then FBI Director Clarence Kelly for changes in FBI procedures, and out of that came a number of changes in other intelligence and criminal prosecution procedures designed to ensure those constitutional rights.

During that period of time, I observed Judge Bork to be a strong believer in civil rights and civil liberties, expressing great concern from a largely academic point of view in terms of his experience, displaying a firm grasp of the constitutional principles involved in the very difficult sometimes cases of first impression that we were looking at, and a genuine, heartfelt concern on a personal basis in addition to his academic expertise that these types of activities not be given the imprimatur of Government thereafter.

I think that there clearly is not only the intellectual capacity, which I believe the Judge has displayed throughout his career, but the sense of feeling with regard to the personal impact of the constitutional guarantees that made him a most worthwhile addition to this group that was working on these highly complex and very important matters.

Senator SPECTER. Thank you very much, Governor.

Ms. LaFontant, let me direct my next question to you. I note that your statement recounts Judge Bork's concern about your status as a woman in the Department. And I notice that you refer to your years as Secretary of the Chicago branch of the NAACP and the board of directors of the American Civil Liberties Union.

Ms. LAFONTANT. That should also be the Illinois division of the American Civil Liberties Union.

Senator SPECTER. It will stand as amended—and a number of other qualifications. And the question I have for you relates to Judge Bork's attitude on the issue of minorities and the Public Accommodations Act, which has been the subject of considerable discussion here, and the opposition that he had early on, his New Republic article of 1963. And I would be interested in your view of Judge Bork's sensitivities to the issue of blacks, public accommodations, women. It is probably going to exceed my time, but I think the chairman will allow you to answer the question.

Ms. LAFONTANT. Thank you. I think the sixties and seventies changed America, especially in the civil rights area. The article written by Judge Bork was in 1963. America has changed since then, people have changed, and I believe Judge Bork definitely has changed. After he wrote that article in 1973, he said, "I made a mistake. I was on the wrong track."

Senator SPECTER. Did he say that to you?

Ms. LAFONTANT. No. I am quoting from a written statement that he made. But I would say since then he has said he made the mistake, definitely, yes.

Senator SPECTER. Well, I am very much interested in your testimony, and I do not wish to interrupt you and prolong it, but I had thought he might have said something to you personally, or some insights you gleaned personally, which might provide an additional dimension of help to the committee. That is why I had interrupted you.

Ms. LAFONTANT. Certainly. Judge Bork has said to me he made a mistake, and that he was on the wrong track. And even though I would say personally that I was on the right track long before Judge Bork got on the right track, I do not hold it against him. All my life, I have been involved in the civil liberties area, civil rights area, have argued cases and been active with every organization you can imagine. I just threw out a few of them here. You might hold it against me if I throw out a few more.

So I was on the right track because I had a heritage that has sensitized me, not only because I am black and female, but I had a father and a grandfather who were lawyers and extremely active in the civil rights movement. My father was a great labor lawyer, representing A. Phillip Randolph in the founding of the Brotherhood of Sleeping Car Porters Union.

So I would say since childhood I have been sensitized, I have known the problems, and I was on the right track. Judge Bork was not on the right track in 1963, but he recanted, he changed, and in 1973, he came out and said it in writing. I talked with him just last month because, when he asked me to come here and testify in his behalf, I flew to Washington to talk with him about some issues that were of concern to me. He reiterated his belief in civil rights, equality for women as well as blacks. And I am sold on the fact that he is completely devoid of racial prejudice. He is not prejudiced against women. I am convinced of it.

I heard his testimony here, and it is like in a jury trial. You look at the witness, and you assess him from the way he appears. So that has to be left with you—how did he appear to you. To me, he is an honest, fine man who would not tell me these things if he did not sincerely believe them.

I even asked him a question about affirmative action when I came to visit with him. And his position is that affirmative action is a good thing; it has been good as a remedy, to remedy the wrongs. And he is for it until the imbalance is cured. Now, some people might say, well, that may be forever; but he said he is for affirmative action as a remedy until the imbalance of this discrimination is cured.

Senator SPECTER. Thank you very much, Ms. LaFontant.

Thank you all, and thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Humphrey.

Senator HUMPHREY. Ms. LaFontant, you cited your family history; your grandfather and your father both were involved in civil rights struggles. Tell us about some of these other organizations in which you have served. What are some of the things you have done in this area, in addition to serving as Deputy Solicitor General?

Ms. LAFONTANT. Let me say at this point that I am director of the Southern Christian Leadership Conference.

Senator HUMPHREY. You are a director?

Ms. LAFONTANT. Yes. Of course, I've been active with the Black Bar, National Bar Association which was founded by my father with three other people during a time that blacks could not join the American Bar Association. I've kept up my activity in that kind of setting also.

Then also I've worked very hard in the majority community of law, of civic affairs, and I'm sure you don't want to have a whole list of all the civic affairs. I trying to get them together in my own mind.

Senator HUMPHREY. I would if I had unlimited time, but may I ask, Mr. Chairman, that Ms. LaFontant be offered the opportunity to provide and be directed, in fact, to provide us a more comprehensive list of her affiliations and activities and achievements in this area?

Ms. LAFONTANT. Yes, I could do that at the end of this testimony.

Senator HUMPHREY. Happy to have you.

[Information follows:]

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115 South LaSalle Street
Suite 3000
Chicago, IL 60603
(312) 781-2383

EDUCATION: Oberlin College, Oberlin, Ohio, Bachelor of Arts Degree in Political Science - 1943; University of Chicago, Chicago, Illinois, Doctor of Law Degree - 1946

PRESENT AFFILIATIONS & INTERESTS

Senior Partner	Vedder, Price, Kaufman & Kammholz
Fellow	International Academy of Trial Lawyers
Commissioner	Blue Ribbon Commission on the Administration of Justice in Cook County
Commissioner	The Martin Luther King, Jr. Federal Holiday Commission
Commissioner	Chicago Tourism Council
Director	Ariel Capital Management Company
Member	*President's Commission on Executive Exchange
Member	Visiting Committee to the Center for Far Eastern Studies - University of Chicago
Member	*Board of Governors of the Ronald Reagan Presidential Foundation
Member	The National Steering Committee of the Fund for America's Future
Board of Overseers	Hoover Institution

CLUBS

Commercial Club; Economic Club - Director; Law Club - Director

*Presidential Appointments

AUGUST 1987

PRESENT
AFFILIATIONS &
INTERESTS CONT.:

COMMERCIAL, INDUSTRIAL, ETC.

Director	The Equitable Holding Corporation
Director	Equitable Life Assurance Society of the United States
Director	Revlon Group
Director	Revlon, Inc.
Director	Mobil Corporation
Director	Ariel Capital Management, Inc.
Director	TBG Broadcasting, Inc.

SOCIETIES, ORGANIZATIONS, ETC.

Fellow	American Bar Foundation
Member	Chicago Bar Association
Member	Cook County Bar Association
Member	National Bar Association
Member	Women's Bar Association of Illinois
Director	Council on Foreign Relations
Trustee	Howard University
Member	The Chicago Committee
Director	Illinois Humane Society
Director	Chamber of Commerce of the United States of America
Director	The Protestant Foundation of Greater Chicago

PREVIOUS PROFESSIONAL
POSITIONS & AFFILIATIONS:

Former President of the Law Firm of Lafontant, Wilkins, Jones & Ware, P.C.

*Deputy Solicitor General of the United States from February, 1973 to June, 1975. Represented the United States Government in preparing and arguing its cases before the U.S. Supreme Court. In addition, in more than 5,000 matters recommended either appeal or no appeal from decisions in the U.S. District Courts and the U.S. Court of Appeals. As a generalist, from February, 1973 through September, 1973, prepared briefs, petitions for certiorari and recommendations in all types of cases, including anti-trust matters. From September, 1973 until June, 1975, as a specialist in civil law and deportation cases, reviewed all briefs

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*Presidential Appointments

AUGUST 1987

PREVIOUS PROFESSIONAL
POSITIONS & AFFILIATIONS CONT.:

and recommendations prepared in those areas of the law. Argued criminal and civil cases in the U.S. Supreme Court.

*United States Representative to the United Nations September, 1972 through December, 1972 with Vice President George Bush.

*Chairman - Illinois Advisory Committee to the U.S. Civil Rights Commission.

Trustee - Tuskegee Institute
Trustee - Lake Forest College
Trustee - Lincoln Academy of Illinois
Trustee - Oberlin College

*Member of President's Council on Minority Business Enterprise.

*Vice Chairman - U.S. Advisory Commission on International, Educational and Cultural Affairs.

Board of Editors - American Bar Journal

Vice President - United Cerebral Palsy of Greater Chicago

Member - Peace Corps 25th Anniversary for the Foundation Board

*Commissioner - National Council on Educational Research

*Commissioner - Executive Committee of the President's Private Sector Survey on Cost Control

Board of Managers of Chicago Bar Association - rated well qualified in 1974 for Judge of the U.S. Court of Appeals by the Chicago Bar Association.

Assistant U.S. Attorney for Northern District of Illinois - May, 1955 through May, 1958. Trial Attorney with Legal Aid Bureau of United Charities of Chicago- 1947 through 1953.

Legal Advisor - Inheritance Tax Division - State Treasurer - 1962 through 1966.

Secretary - National Bar Association - 1973 rated exceptionally well qualified for Judge of U.S. Court of Appeals.

*Presidential Appointments

AUGUST 1987

PREVIOUS PROFESSIONAL
POSITIONS & AFFILIATIONS CONT.

Village Attorney for Village of Robbins and East Chicago Heights, Illinois.

Board of Directors - Public Television Station WTTW-Channel 11.

Director - Jewel Companies, Inc.
Director - The Hanes Corporation
Director - The Bendix Corporation
Director - Harte-Hanks Communication, Inc.
Director - Foote, Cone & Belding Communications, Inc.
Director - Continental Illinois Corporation
Director - Continental Illinois National Bank & Trust Company of Chicago
Director - Trans World Airlines
Director - Pantry Pride, Inc.
Director - Transworld Corporation

Active in civic, Republican and professional organizations. Recipient of numerous awards and honorary doctorates, some of which are:

Howard University - Doctor of Humane Letters
Cedar Crest College - Doctor of Laws
Providence College - Doctor of Humanitarian Service
Eastern Michigan University - Doctor of Laws
Heidelberg College - Doctor of Laws
Lake Forest College - Doctor of Laws
Governor's State University - Doctor of Humane Letters
Marymount Manhattan College - Doctor of Laws
Oberlin College - Doctor of Laws
Governor State University - Doctor of Laws
The Chicago Medical School - University of Health Sciences - Doctor of Laws
Loyola University of Chicago - Doctor of Laws
University of Chicago - Citation for Public Service

Howard B. Shepard Award - Civil Rights
Outstanding Leaders Award - Protestant Foundation Little Flowers Seminary Society
Service Award - Black Affairs Committee - Drug Enforcement Administration U.S. Department of Justice
OIC Corporation Communication - Humanitarian Award
Candace Award - Distinguished Service - National Coalition of 100 Black Women

AUGUST 1987

Selected as one of America's Top 100 Black Business & Professional Women by Dollars & Sense Magazine (August 1985)

Adlai A. Stevenson II Award for service and support of the United Nations

PAR EXCELLENCE Service Award - People United to Save Humanity (PUSH)

Honoree at the 2nd Annual "Tribute to Chicago Women" dinner sponsored by the Midwest Women's Center

Selected as one of the World's Outstanding International Business & Professional Women by Dollars & Sense Magazine (June 1987)

The National Coalition of 100 Black Women established a scholarship in JSL's name at Smith College - 1987.

Husband, father and grandfather, now deceased, of Jewel S. Lafontant were all attorneys and she is the mother of a 29 year old son, John W. Rogers, Jr., a graduate in Economics from Princeton University and President and CEO of Ariel Capital Management, Inc. of Chicago.

Senator HUMPHREY. I've heard, only hearsay, that you were under some pressure not to appear and testify on behalf of Robert Bork, is that correct?

Ms. LAFONTANT. I don't know that I like the word "pressure." Let's say on the Hill we call it lobbying, don't we.

Senator HUMPHREY. You were lobbied——

Ms. LAFONTANT. Yes.

Senator HUMPHREY [continuing]. By some mainline minority groups, is that it? Or do you care to say? Individuals or groups?

Ms. LAFONTANT. Primarily individuals representing various groups, yes.

Senator HUMPHREY. You know these nuances. You mentioned the importance of looking the members of the jury in the eye and the witnesses in the eye, and so on. Certainly we have had an opportunity to do that, and a lot comes out in the way of nuance.

So can you give us a little more detail in the way of nuance about the event that you described when you went to Robert Bork while he was Solicitor General and complained that all of the men deputies were being invited to important meetings but you were being excluded and that furthermore because you were being excluded you were missing out on the details of the Department's work and were not being offered an opportunity to argue some of the important cases?

Can you give us a little bit more about that? You went and saw Robert Bork face to face or was it a phone call or a letter? How did it work?

Ms. LAFONTANT. No. I went right in to see him. He was that kind of boss, so to speak, that he didn't stand back on ceremony. You didn't have to call and make an appointment. You go into his office, and if the secretary said he was in, you asked to see him, and he let you me see him immediately.

At that point, I did not know how important it was that I was not at some meetings since this was my first affair. I just know that I rebel against being left out of anything where I am supposed to be, and I don't carry a chip on my shoulder, but I was aware of the fact that there had never been a black at the Deputy Solicitor General's level.

We had had a black Solicitor General which was Thurgood Marshall, but there had never been a woman, black or white, and the way I was treated when I first went there—I was aware of the fact that I was being ignored because I had been ignored before.

But it was so important to me to have the opportunity to argue our government's cases in the Supreme Court that I won't say I adjusted, but I tried to put it behind me, the fact that I was being ignored.

But when I was told that I was being isolated and kept out of these meetings and I went to Bob Bork, I really did not know the importance of it. I just knew that this was something that was happening because of my color or because of my sex.

He knew what was happening at that time, and that's why I think he was so upset because he had just come onboard himself. I came in in February 1973, but Bob Bork did not come until about May.

Senator HUMPHREY. Yes.

Ms. LaFontant. So he couldn't believe it. He said, "Are you sure?" And I told him what I had heard and he took care of it right away. No nuances except he is a very straightforward guy. He saw an injustice and decided to correct it.

When we started our Federal Women's Program, he was behind it 110 percent, and actually when we would have our activities, what I call women's expo, Judge Bork actually participated in the program. He lent the weight of his office to this endeavor and we were very grateful for it.

Senator Humphrey. Well, even though in the case of rectifying the wrong involving discrimination against you with respect to not being invited to the meetings, even though he was brand new in the job, just getting his feet on the ground, one would think he wasted no time in righting that injustice.

Ms. LaFontant. That is right.

Senator Humphrey. Well, an old Chinese proverb says—I'm really making this up—but an old Chinese proverb says that actions speak louder than old articles.

Ms. LaFontant. And a late convert is sometimes the best.

The Chairman. Thank you very much. Any questions from my colleague from Alabama?

Senator Heflin. I will pass.

The Chairman. Senator Leahy.

Senator Leahy. I will pass.

The Chairman. I want to thank you all very much for your being here. Again, thank you for allowing us to take one of the witnesses out of order.

Mr. Randolph. Mr. Chairman, I have submitted a written statement. I assume that will be made part of the record.

The Chairman. Yes. All written statements will be placed in the record in their entirety.

Thank you.

Our next panel is composed of some very distinguished professors. If they would come forward as they are called. Paul Bator is a professor of law at the University of Chicago Law School. Henry Monaghan is a professor of law at the Columbia Law School. Lillian Riemer BeVier is a professor of law at the University of Virginia. Leo Levin is a professor of law at the University of Pennsylvania Law School. Dallin H. Oaks is dean of the Brigham Young University School of Law.

They are all on their way. While they are on their way down, I should announce that the next panel will be made up of Howard Krane, Kenneth Bialkin and Read Carlock. They will be the panel to follow this panel.

We will recess in place until the witnesses actually walk in the room.

[Short recess.]

The Chairman. Will you all four stand and be sworn while we are waiting for Mr. Oaks so that we can move forward.

Do you swear that the testimony you are about to give is the whole truth and nothing but the truth so help you God?

Mr. Bator. I do.

Mr. Monaghan. I do.

Mr. BeVier. I do.

Mr. **Levin**. I do.

The **Chairman**. Let us begin, I guess, with you, Professor Bator. And we have a 5-minute rule, and if we could keep to it, we would appreciate it. And we'll start from you and move toward your left.

Welcome.

TESTIMONY OF ACADEMIC PANEL INCLUDING PAUL BATOR, HENRY MONAGHAN, LILLIAN RIEMER BeVIER, LEO LEVIN, AND DALLIN H. OAKS

Mr. BATOR. Thank you, Mr. Chairman.

My name is Paul Bator. I am John Wilson professor of law at the University of Chicago. For 25 years, I was a law professor at Harvard, and in 1983 and 1984, I was Deputy Solicitor General and counsel to the Solicitor General of the United States.

I have been a student of the jurisdiction and the work of the Supreme Court for my whole professional life. I have known Judge Bork for many years. I am generally familiar with his scholarly and his judicial work.

I will be very brief. I think virtually everything that can be said about this has been said already.

My own view, Mr. Chairman, is that the country will be better off with a Robert Bork on the Supreme Court than without him because he is a person of surpassing intellectual distinction, because of his outstanding integrity and intellectual honesty, and because of his commitment to the rule of law.

In terms of qualifications, the Bork nominations seems to me to be one of the five or six most distinguished of the century. We have had many mediocre Justices in this century. To reject a nominee of outstanding distinction would be to miss an important opportunity.

I'd like to say one special word about Judge Bork. It seems to me important to note that in each of the various roles and contexts where he has operated, he has served with great distinction in terms of the requirements of the particular role and institution.

When he was a professor, he really did what professors are supposed to do. He was controversial, he was provocative, he was creative. I think sometimes he was wrong headed, but he was always illuminating and always interesting.

As Solicitor General, Judge Bork performed in the very highest traditions of that office. And I hope members of the committee have carefully read the really powerful and moving letter that was written to the committee by the lawyers, the very distinguished lawyers who served with Judge Bork in that office. A letter which speaks of Judge Bork's professionalism, of his tolerance and openness, of his dedication to the judicial process and reasoned decision-making, and his commitment to the rule of law.

And, finally, as a judge, Judge Bork has served with great distinction and with completely appropriate institutional commitments and traditions. And it does seem to me very unjust to assume or to state that when Judge Bork goes on the Supreme Court, he will suddenly go haywire, and start operating as a radical eccentric, oblivious to the traditions and institutional constraints of that office. There is no evidence for that proposition.

Mr. Chairman, my own view on the standards to be used for this nomination are somewhat eccentric. Nevertheless, I am one of those who do continue to believe that, in the long run, the Senate and the Court will be better served, and we will be better off if the Senate resists the temptation to use the confirmation process as a way of expressing agreement or disagreement with the nominee's constitutional philosophy.

I don't question the Senate's right to do that. But I think it would be wiser not to do it. I think it would be wiser for a number of reasons. Some of them I spelled out in a piece I wrote that I would like to append to this statement and have introduced in the record.

The CHAIRMAN. Without objection, it will be placed in the record.

Mr. BATOR. I think that it is wiser because I think a detailed inquisition into the nominee's views tremendously exaggerates the extent to which a single Justice's votes can affect the constitutional developments. No single Justice decides things by himself or herself. The notion that a single Justice by a single vote can represent a great danger to the country seems to me to be completely hysterical.

An individual Justice is part of a complex, dynamic process. His or her ability to influence the development of the law depends on a complicated web of circumstances. In the end, Justice Bork will be influential only to the extent that he can persuade four other Justices, and the process whereby that is done is crucial. And it is to that process that Justice Bork—Judge Bork would bring exceptional insight, exceptional intelligence, and a wide background of public experience.

Thank you.

The CHAIRMAN. Thank you. And I apologize, Professor Bator, for mispronouncing your name. I'm sincerely sorry.

Mr. BATOR. It's happened to me before, Senator.

The CHAIRMAN. It happens to me a lot too, and that's why I sincerely apologize.

[Statement of Mr. Bator follows:]

September 28, 1987

STATEMENT OF PROFESSOR PAUL M. BATOR, TO
THE SENATE COMMITTEE ON THE JUDICIARY,
HEARINGS ON THE NOMINATION OF ROBERT H.
BORK AS ASSOCIATES JUSTICE OF THE UNITED
STATES SUPREME COURT

Mr. Chairman and Members of the Committee:

My name is Paul M. Bator. I am John P. Wilson Professor of Law at the University of Chicago; I am also counsel to the firm of Mayer, Brown & Platt, in Chicago. For 25 years I was a teacher at the Harvard Law School. In 1983 and 1984 I was Deputy Solicitor General and Counsellor to the Solicitor General of the United States, in the Department of Justice. I have been a student of the jurisdiction and work of the United States Supreme Court for all of my professional life. I am co-author of the current edition of a leading text on the Court's work, Hart & Wechsler's The Federal Courts and the Federal System.

I have known Judge Bork for many years. I am generally familiar with his scholarly and judicial work, although I have not given it the detailed and gimlet-eyed perusal that others have.

I will be very brief, since virtually everything that can be said about this nomination appears to have already been said. My own view is that the country will be better off with a Robert Bork on the Supreme Court than without him, because he is a person of surpassing intellectual distinction, because of his outstanding integrity and intellectual honesty, and because of his deep commitment to the rule of law. In terms of qualifications, the Bork nomination seems to me to be one of the five or six most distinguished of this century. We have had many mediocre Justices in this century, and not a large number of outstanding distinction. To reject a nominee of outstanding distinction would be to miss an important opportunity; it would result in a loss to the country.

My own view on this matter is, I have come to realize in the last weeks, somewhat iconoclastic, even eccentric. Nevertheless, I continue to believe that in the long run the country and the Court will be better off if the Senate resists the temptation to use the confirmation process to express its agreement or disagreement with the nominee's views on various specific constitutional questions. I do not question the Senate's right to treat confirmation as a plebiscite on the nominee's views; and at various times various Senators have followed that practice. But there exists a countervailing tradition, too; many Senators have often acceded to the nomination of a well-qualified candidate notwithstanding disagreement with or misgivings about his or her views. Thus the Senate has two traditions available to it, and it is free to choose. In my judgment, the wiser course over the long run would be for the Senate to subordinate ideological and substantive issues, and to confirm candidates of great distinction even if there is sharp disagreement with his or her particular views.

The reason for that conclusion I tried to spell out in a short piece I wrote a few weeks ago, a truncated version of which appeared in the New York Times on September 11 of this year. With the Committee's permission, I would like to append my original version of that piece to my statement and have it included in the record of these hearings.

The practice of converting the confirmation process into a plebiscite based on constitutional philosophy seems to me to be mistaken for a number of reasons. First, it tends to focus attention on the short run rather than the long run. To make confirmation depend on substantive agreement on particular questions assumes that we can know today what tomorrow's issues will be and how a given nominee will vote on them in the future. But the overwhelming lesson of history is that both issues and Justices change; in the long run, the important question is not how the nominee will vote on today's cases, but on the qualities of mind and spirit and conscience that he or she will bring to questions that we cannot even perceive today.

Second, a detailed inquisition into the nominee's views highly exaggerates the extent to which an individual Justice's individual vote will determine the course of constitutional law. No Justice can decide things by himself or herself. The notion that a single Justice by a single vote can represent a huge danger to the country seems to me quite hysterical. An individual Justice is part of a complex institution and a complex and dynamic process. His or her ability to influence the development of the law depends on a complicated web of circumstances and historical forces; it also depends, in the end, on a process which leads at least four other Justices to agree that a particular view represents the correct interpretation of the Constitution.

For this reason -- and this is my third point -- what is really important is that that process of reaching decision -- and the subsequent process of explaining it and justifying it in an opinion -- be as intelligent and wide-ranging and deeply illuminated as possible. The Supreme Court exercises huge power. It is critical that the process by which that power is exercised be as intellectually rigorous and honest as possible. And that is why it is of fundamental importance that the persons exercising that power be persons of the greatest possible professional distinction, equipped with powerful and wide-ranging minds and spirits. To make everything turn on agreement with the votes that we guess the nominee will cast underestimates the contribution to the Court and the country made by Justices of powerful intellectual gifts and great intellectual honesty. What will be important about a Justice Bork, in the long run, is not just how he votes on the hot questions of today, but what qualities of inquiry and analytical rigor and intellectual honesty he brings to the Court's deliberations and to the processes whereby the Court's judgments are explained and justified in its opinions.

Finally, my fourth reason for worrying about institutionalizing a practice that makes confirmation turn primarily on ideological considerations is that it threatens to enthrone a narrow and partisan definition of what is to be deemed as orthodox and acceptable in constitutional debate as the single official constitutional dogma of the country. I am profoundly disturbed by a confirmation process that rests on the proposition that there exits a single tradition or mainstream of constitutional philosophy and all who do not accede to it are to be excommunicated as being beyond the pale. For the fact is that what is characterized as the mainstream is often a partial and highly partisan version of the Constitution, and the effort to impose it as the single legitimate version is impoverishing and historically false. The mainstream includes both those who would give the Constitution the most expansive interpretation and allow judges to exercise a wide power to redress wrongs and expand rights as they see fit, and those who see a more limited role for the Court, closer to the text and intention of the framers of the Constitution and the Amendments, and who support a larger role for the democratic branches of government. And many of the decisions agreement with which has been used in these hearings as a touchstone of whether one is acceptably right-minded or irremediably wrong-headed were themselves highly controversial decisions, many reached by 5-4 or 6-3 votes, with majorities and minorities often split in their reasoning 3 or 4 ways. What is the "mainstream" in this context? Justices Jackson and Harlan never agreed to the proposition that the First Amendment applies across the board to the States; does that make them dangerous characters who should not be confirmed today? The reasoning of Shelly v. Kramer was attacked as unprincipled and unintelligible by my teacher and colleague, Professor Wechsler, in his celebrated article on Neutral Principles; is he now to be deemed beyond the pale? Justice Black was a furious critic of the notion that the Court is free to create new rights out of the penumbra and silences of the Constitution: is he now to be redefined as a dangerous radical who should not have been on the Court? And in his great book The Spirit of Liberty, Judge Learned Hand said that Marbury v. Madison itself was probably illegitimate; are we to excommunicate him too?

There is something profoundly disturbing about a process that requires the Senate to reach anything more than the most general and generous and wide-ranging judgments about what is to be deemed acceptably orthodox in constitutional debate. And what has been characteristic about the attack on Judge Bork, it seems to me, is precisely that a single (and highly controversial) theory of Constitutional interpretation has been put forward as the only legitimate one, and all who disagre with it read out of the mainstream. And, of course, it is particularly ironic that those who are now so cheerfully and aggressively encouraging the Senate to impose this narrow orthodoxy are persons who, on other days, never tire of flaunting their special fervor about the First Amendment.

To conlude: my recommendation to the Committee is that it adhere to the practice which has sometimes been adopted, of giving a heavy presumption in favor of the President's nominee if that person possesses outstanding professional, intellectual and moral qualifications for the office of Supreme Court Justice. That practice seems to me to put the focus where it belongs; it restrains the winds of politicization and partisanship that endanger the Court; it recognizes that intellectual depth and integrity are as important to the law as bottom-line votes; and it de-escalates the importance of creating an official definition of what is acceptably right-minded in Constitutional debate.

On that approach, I don't think there is much doubt that Judge Bork passes with flying colors. He is a nominee of outstanding professional, intellectual and moral qualifications. The processes of the Supreme Court's deliberations will be deepened and expanded by his presence; and in the long run that cannot but be an important service to the Court and this country.

Let me say one more word about Judge Bork. It seems to me important to note that, in each of the various roles and institutional contexts where he has operated, he has served with outstanding distinction in terms of the requirements of that particular role and institution. When he was a Professor, he did just what we want Professors to do: he was creative, controversial, provocative, sometimes wrong-headed, but always illuminating and interesting. As Solicitor General, Judge Bork performed in the highest traditions of that great office; and I hope members of the Committee have carefully read the really powerful and quite moving letter that was written to the Committee -- which I would also like to incorporate as an appendix to this Statement -- by the lawyers who served in that office when Judge Bork was Solicitor General -- a letter in which these splendid lawyers, of every political persuasion, speak about Judge Bork's professionalism, tolerance, and openness, about his dedication to judicial process and reasoned decision-making, and his commitment to the rule of law and to respect for individual liberties and civil rights. And, finally, as a judge, Mr. Bork has served with exemplary distinction and within a completely appropriate institutional frame of reference in that role, too. It seems to be profoundly unjust, therefore, to suggest that when Judge Bork becomes a Supreme Court Justice, he will somehow go completely haywire and start operating as a radical eccentric oblivious to the traditions and institutional constraints of that office. There is just no evidence for that proposition.

My conclusion, Mr. Chairman, is simple: in this, the 200th year of our Constitution, the Senate would render the country and the Supreme Court a great service by confirming Robert Bork to be an Associate Justice of the United States Supreme Court.

APPENDIX 1

July 14, 1987

SUPREME COURT APPOINTMENTS: HOW THE SENATE CAN SERVE THE COUNTRY

by

Paul M. Bator

A debate is raging about the Bork nomination. One question that has been raised is the proper role of the Senate: should Senators take into account whether they agree or disagree with the nominee's constitutional philosophy? In an Op-Ed article in the Times (7/3/87), Professor Herman Schwartz demonstrated that Supreme Court nominations have, throughout our history (and particularly in the early period) been scrutinized by the Senate on ideological grounds, and that there are cases where distinguished and highly qualified nominees were rejected on such grounds. From this Mr. Schwartz concludes that it would be desirable and legitimate for Senators to reject the nomination of Robert Bork -- no matter how distinguished and qualified he may be -- simply because they have serious disagreements with his views on constitutional issues.

Mr. Schwartz's history is accurate as far as it goes, but tells only a part of the story. Ideological considerations have sometimes played a major role; but there exists an important countervailing tradition as well. Particularly in recent times, the more typical practice has been to mute ideological issues, and most Senators have, most of the time, been willing to support the confirmation of a well-qualified nominee notwithstanding strong disagreement with his views. It was that tradition of forebearance that explains the overwhelming vote in favor of Justice Scalia, and that in fact has animated most Senators over the past 100 years.

We have, therefore, two traditions available to us, and we are free to choose between them. Which is the better road? Would it be good for the country, in the long run, to adopt Mr. Schwartz's approach, and to encourage Senators to test all appointments by an ideological test?

I say all appointments, because this surely is a case where sauce for the goose is sauce for the gander. If it is legitimate for liberal Senators to work to defeat a highly distinguished nominee because they do not like his views, surely the same is true when a Democratic President nominates an activist jurist whose views are unpalatable to advocates of judicial restraint. If it is appropriate to defeat the Bork nomination because he might change the complexion of the Court, it must be equally appropriate to defeat a nominee, no matter how distinguished, who might shift the Court's "balance" in the other direction.

In my judgment it would be unwise, and a disservice to the country, to politicize the appointments process by adopting the practice of testing Supreme Court appointments by ideological standards. Here are my reasons:

(1) Making ideological considerations paramount in the confirmation process will undoubtedly encourage Presidents to play it safe: to nominate candidates who have no controversial views or have not expressed them. It will act as a severe deterrent to the nomination of any candidate with an outspoken or controversial record on the great constitutional issues. The result will be to put pressure on the system to favor mediocrities rather than persons of outstanding qualities of mind and spirit. (This result will be compounded if we legitimize the practice of allowing a minority of opposed Senators to filibuster a nomination to death on ideological grounds.) It is men like Brandeis and Hughes, Frankfurter and Black -- men with brilliant and controversial political or scholarly careers -- who are likely to (and did) arouse intense ideological opposition.

The Brandeis case is a telling example. Like Bork, Brandeis was a candidate of surpassing professional distinction and intellectual integrity. His views, however, were regarded as extremist and radical by many conservatives. The nomination evoked serious ideological opposition, but in the end good sense prevailed and Brandeis was confirmed. But suppose a majority of the Senators had, in 1916, been in deep disagreement with Brandeis' philosophy. Would it be good for the country to put pressure on Presidents not to nominate a Brandeis? To let him be defeated if he were nominated? Would the country have been better off if liberal opposition to Charles Evan Hughes' nomination had succeeded?

(2) Allowing ideological considerations full play in the confirmation process inevitably focuses attention on short-term, not long-term, considerations. It involves a judgment based on guesses as to how the nominee will vote on today's issues. But the Justices tend to be around for a long time. Issues change; we cannot know what will be the great constitutional challenges and crises of tomorrow. It is a mistake to worry too much about how a Justice will vote on cases on the current docket. Far more important is what qualities of mind and spirit he will bring to issues that are unperceived or only dimly perceived today. If a nominee is a person of exceptional intellectual and moral strength and integrity, he is likely to make a creative and important contribution to the solution of tomorrow's problems.

(3) It's not only issues that change. People change too. History is full of examples of how Supreme Court Justices change over time. Justice Black, strongly committed to every liberal cause at the start, became a dissenter to many Warren Court forays. Justice Blackmun, appointed by President Nixon on account of his conservative views, has become a member of the Court's liberal wing. Chief Justice Warren surprised (and disappointed) President Eisenhower, as Holmes had surprised and disappointed Theodore Roosevelt. Despite virulent opposition by liberals to Hughes' nomination, Hughes played a distinguished moderating role on the Court.

What all this shows is that the dynamics of the Supreme Court are quite different from those suggested by the superficial pigeon-holing of nominees into pat ideological camps. In the end it turns out that the Justices -- or at least the fine ones -- become judges, not partisans for narrow ideological causes.

(4) Allowing the current "hot" issues to dominate the confirmation process distorts our evaluation of the nominee and of the impact he might make on the Court. Already, a caricature of Robert Bork -- based on quoted snippets pasted together from a

richly productive 25-year career as Professor, public servant and judge -- is emerging. What is driven out in this politicized atmosphere is any serious attempt to reach a balanced evaluation of the serious and entirely legitimate Constitutionalism that animates Bork. What is also left out is a sense of the enormous contributions that Justices of great intellectual distinction and moral stature can make to the work of the Court. What was important about Brandeis was not that he was pro-union, or favored particular items of social welfare legislation, but the fact that he brought remarkable creative insight and intellectual honesty to the development of the law. What will be important about Robert Bork, in the long run, is that he will add insight and honesty and creativity to the quality of the Court's deliberations and opinions.

Supreme Court vacancies present us with an important opportunity and challenge. It would be sad if we took on the habit of insisting that the vacancy be filled either by a person whose views pleased everyone, or by one who has uttered the correct buzz-words to meet the current Senate's litmus test for ideological correctness. All too rarely does a President give us the opportunity of having on the Court a person of remarkable qualities of mind and spirit. When he does so, we should grasp it with fervor. The country was better off in having a Brandeis on the Court; it will be better off for the presence of a Robert Bork.

(Paul M Bator is John P. Wilson
Professor of Law at the
University of Chicago. He was
Deputy Solicitor General and
Counselor to the Solicitor
General of the United States
in 1983 and 1984.)

APPENDIX 2

September 17, 1987

The Honorable Joseph Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The undersigned served as attorneys in the Office of the Solicitor General during the tenure of Robert H. Bork. We are writing to advise the Committee of our collective opinion regarding Judge Bork's traits of character, judgment, and legal ability, which bear upon his fitness to hold the office of Associate Justice of the Supreme Court of the United States. Some of us served only with Judge Bork, while others served with one or more other distinguished Solicitors General. We constitute a group with diverse backgrounds and varying political and philosophical outlooks. We are united, however, in the views expressed herein.

In cataloguing Judge Bork's qualifications, one must begin with his legal talents. He has a penetratingly logical mind, seasoned by a thoughtful and wise understanding of the nature of law and the judicial process. We think there can be (and in fact is) no dispute that Judge Bork would make a very substantial intellectual contribution to the work of the Supreme Court.

As Solicitor General, Judge Bork displayed a profound respect for the role of the Supreme Court in our system of government and an enlightened appreciation of the Solicitor General's unique relationship with and responsibility to the Court. As a teacher, scholar, and practitioner, Judge Bork had given serious thought to, and had written extensively about, many of the fundamental issues that confront the Supreme Court. During his tenure as Solicitor General, however, he never allowed his personal views to interfere with his obligation to represent the interests of the United States.

In all cases within our experience, including those that presented issues on which Judge Bork had previously formed well-developed legal judgments, he was without fail accessible to those with whom he worked and tolerant of views at odds with his own. He listened carefully to opposing arguments, frequently relishing the opportunity to test his own views in the cauldron of debate. He fully considered all sides before reaching a final judgment, and he always provided cogent reasons for his conclusions, particularly on those rare occasions where his judgment departed from the recommendations of his staff.

In short, our sense, based on years of dealings with Judge Bork concerning a host of difficult and sensitive legal issues, is that he is genuinely open to persuasion, even on questions to which he has devoted extensive thought. The Robert Bork we know bears no resemblance to the image of a closed-minded ideologue that some have sought to foster.

While Judge Bork's jurisprudence has been accurately characterized as "conservative" -- in the sense that he has held firmly to principles of judicial restraint -- his opinions have been well within the mainstream of American legal thought. Judge Bork's philosophy embodies a deep respect for and thoughtful consideration of the nature of the judicial process and an unflinching dedication to reasoned decision-making. Moreover, we know from first-hand experience that, as Solicitor General, Judge Bork displayed an abiding commitment to the rule of law and to respect for individual liberties and civil rights.

We appreciate the opportunity to convey these views to the Committee.

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The undersigned subscribe to the statements in this letter regarding Judge Bork's character, judgment, and legal ability but do not believe that it is appropriate for them, as judges, to make any recommendation to the Senate with respect to the confirmation decision.

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cc: Members of the Senate Judiciary Committee

The CHAIRMAN. Professor Monaghan.

TESTIMONY OF HENRY MONAGHAN

Mr. MONAGHAN. Mr. Chairman, members of the committee, my name is Henry Paul Monaghan. I am Harlan Fiske Stone professor of constitutional law in Columbia University. And I appear to urge the Senate to confirm Robert Bork as an Associate Justice of the Supreme Court.

In my view, no more than a score of persons has ever been nominated to the Supreme Court with such surpassing credentials.

Judge Bork's nomination should have been met with acclamation. But, from the beginning, this nomination has been the occasion for a wide ranging referendum on the Reagan Presidency and on various specific Supreme Court decisions. In that controversy, Judge Bork's qualifications, indeed Judge Bork himself has been wholly submerged.

Judge Bork has been replaced by a wholly symbolic, larger than life Judge Bork, and every effort has been made to depict him as a dangerous liberty threatening radical.

In my introductory remarks, I want to make only two points. First, I want to emphasize that there is no evidence, none at all, that either Judge Bork's general judicial philosophy or his attitude toward specific Supreme Court decisions is radical or atypical.

Judge Bork's general views, as well as his views on specific topics, are shared in whole or in part by a wide range of respected judges and academics. Of course, these views have been rejected by others, and the committee has heard some of those rejecters. But the point is not who is ultimately right on any given issue if there were any tribunal on earth that could settle such a question.

The point is that, on issue after issue, topic after topic, a great many knowledgeable and thoughtful persons quite agree with Judge Bork. I therefore simply do not understand how it can be said that Judge Bork is some radical figure standing far outside the mainstream of legal thought. He has in fact been an important contributor to the mainstream, particularly on the appropriate role of courts in the process of constitutional government.

My second point relates to a different subject, namely Judge Bork's alleged change of mind. For some, the objection to Judge Bork is not that his views are radical, but that he has changed his mind.

I want to put aside such matters as just how much Judge Bork has changed his mind, as well as just how radical his views were to begin with. The important point is that Judge Bork has changed his mind and, in my view, there will be more changes. I certainly hope so.

In the last few years, I've had occasion on at least four separate occasions to talk with Judge Bork at some length. I think that I've developed a reasonably good idea of his beliefs, not all of them, but certainly some of them. At least some of the views that Judge Bork has expressed to this committee he has expressed to me before his nomination. This is true both in the importance of precedent in constitutional adjudication and the fact that the equal protection clause of the 14th amendment must now be understood to forbid any substantively unreasonably classification.

Judge Bork's views have evolved and they will continue to evolve, and this is exactly how it should be for any lawyer possessed of an intelligent inquiring fair intellect who deals seriously with the hard issues of constitutional law.

For me, therefore, the fact that Judge Bork has shown the capacity to change his mind is among the strongest possible reasons for confirming him.

In closing, permit me to return to my first point. The hard fact is that Judge Bork's views are not out of the mainstream. There are more than a score of distinguished circuit judges and law professors who hold views similar to those of Judge Bork, not all of whom, I might add, are as open-minded as Judge Bork.

If Judge Bork is not confirmed, the administration will select another moderate conservative. I hope you will not think me presumptuous to say that the second nomination will pass. To my mind, therefore, what is at stake is not the immediate composition of the Supreme Court. What is at stake here is something quite different. The impact of a process of government on a man's reputation.

I want to insist that it is simply wrong to depict Judge Bork as a radical or to intimate that he lacks integrity. And it is wrong to say that his confirmation would constitute a serious threat to the liberties of the American citizen.

It is deeply upsetting to me to see a man with so distinguished a public career made the object of such an attack. If Judge Bork is not confirmed, the course of history will not change, but we shall have witnessed a small and, for me, sad episode in the Senate's history.

Thank you.

Senator **DeConcini**. Thank you very much. We will now hear from Ms. BeVier, is it?

Ms. **BeVier**. BeVier, yes.

Senator **DeConcini**. Thank you.

Ms. BeVier.

TESTIMONY OF LILLIAN RIEMER BeVIER

Ms. **BeVier**. I am Lillian BeVier, and I am the Doherty Charitable Foundation professor of law at the University of Virginia.

I am afraid that much of what I have to say in my opening remarks you will find somewhat an echo of themes that have been stressed before, but I think at this point there is little new that can be said, and, indeed, some points do bear saying over and over again, and do not become less true for the fact that they are repeated.

It is useful to remind ourselves of why a philosophy of judicial restraint is so consistent with our basic constitutional scheme. The focus of these hearings on that issue has been exceptionally valuable, yet I know for some of you questions linger.

Just what does judicial restraint require of judges in the context of particular cases? Does it necessarily imply overruling past decisions reached by activist judges?

Well, the answer is no. Does it invite abdication of, or, worse, selective attention to the judicial duty to protect individual and minority rights that do exist? Once again, clearly, no.

Well, as everyone knows by now, when Judge Bork was Professor Bork, he was often highly critical of Supreme Court decisions. This is what constitutional law professors are paid to do. None of us are paid enough. I think he was probably more underpaid than most. All things considered, he was definitely more underpaid than most.

He has been rather virulently attacked for some of the conclusions he reached when he was a scholar. Most often, though, his critics have been confused about what exactly Judge Bork has said.

They have misunderstood his criticism of the Court's reasoning and equated it with criticism of the Court's results.

But Judge Bork's critical comments have always been aimed at the reasoning of Supreme Court opinions and never at their results, and criticism focused on the Court's reasoning is a vital element in our system of checks and balances, for it is reasons and not raw political power that must justify everything the Court does.

Correct reasons give legitimacy even to the most controversial decisions. Bad reasons can transform even the results we like into abuses of power.

And if scholars do not worry about judicial abuses of power, who will? And if no one does, what will become of our democracy?

Because he has been critical of some of the Court's past cases, some of his opponents have indulged in a rather simplistic prediction. If Judge Bork is on the Court they say he will vote to roll back the clock and massively repudiate the decisions whose reasoning he has questioned.

But Senators, this is not going to happen. As Judge Bork himself has repeatedly emphasized, it is one thing to ask whether the Court should, in the future, recognize new rights that the Constitution does not specify. It is quite another thing altogether to ask how the Court should deal with the rights that have, even mistakenly, been recognized in the past.

Whether a precedent should be followed involves different considerations, legitimately different from whether it should have been created in the first place.

Even if a past case were a mistake, it may very well be that it neither can nor should be undone, and in some sense, overruling precedents is like trying to undo the consequences of a mistake. We all know, Judge Bork knows, that while we can learn from our mistakes we cannot undo their consequences.

Of course any rigid notion that precedents ought to be binding just because they are precedents is unacceptable. With such a notion we would still be living in a *Plessy* v. *Ferguson* world. But precedents usually ought to be followed, even by judges who have been highly critical of them, and there is no inconsistency here with a philosophy of judicial restraint. We need not feel we have to undo the past in order to restrict the Court in the future to the creation only of rights with genuine sources in the Constitution.

Judge Bork has also consistently emphasized another important aspect of his kind of judicial restraint. It is totally consistent with vigorous enforcement and protection of the rights that are in the

Constitution. The Court need not always be willing to create new rights in order to fulfill its role. Indeed, the Court's most basic role is to stand vigilant against encroachments of existing rights.

The Court must give these rights firm and consistent enforcement. The Court must be willing to define their scope fully and expansively. And if the Court concludes that a claim lacks merit, it must carefully and thoroughly explain why. Judge Bork's philosophy of judicial restraint plainly embraces these essential components of judicial responsibility.

This is completely obvious when you look at his opinions as a circuit court judge. Indeed, it is quite frankly difficult for me to believe that one could read those opinions and conclude otherwise. The opinions exemplify both Judge Bork's superb judicial craftsmanship and his resolute fair mindedness.

In the debates over this nomination, concern with specific outcomes has tended to take the place of attention to matters of judicial method. Questions about Judge Bork's judicial philosophy have distracted us from equally important inquiries about whether the judicial obligation to explain has been adequately discharged. We forget at our peril, I think, that a stated rationale is the only purchase that any member of the Court's constituency has upon its decision. If the Court will not tell us how it reached its decisions—what were its premises of reasoning, what its main lines of authority, what its factual conclusions—then we cannot hope to be genuine participants in its decisionmaking in the future, and the Court will become, truly, accountable to no one.

The obligation to explain, to give reasons, to fully articulate lines of analysis considered relevant is an obligation upon which Judge Bork has never defaulted.

In short, when Judge Bork practices judicial restraint, he neither abdicates the judicial obligation to protect individual and minority rights nor does he shrink from appropriate opportunities to expand those rights.

And when he practices judicial restraint he does so in the very finest tradition of his calling. Thank you.

[Prepared statement follows:]

TESTIMONY BEFORE THE
SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF ROBERT BORK

prepared by

LILLIAN R. BEVIER

DOHERTY CHARITABLE FOUNDATION PROFESSOR OF LAW

SCHOOL OF LAW

UNIVERSITY OF VIRGINIA

It is useful to remind ourselves why a philosophy of judicial restraint is so consistent with our basic constitutional scheme. The focus of these hearings on that key issue has been valuable. Yet questions linger. Just what does "judicial restraint" require of judges in particular cases: Does it necessarily entail overruling past decisions reached by activist judges? The answer is no. Does it invite abdication of -- or, worse, selective attention to -- the judicial duty to protect individual and minority rights that do exist? Again, the answer is no.

As everyone knows by now, when Judge Bork was Professor Bork he was often highly critical of Supreme Court decisions. (This is what professors of constitutional law are paid to do, of course.) (None of us is paid enough, but all things considered Judge Bork was more underpaid than most.) And he has been rather virulently attacked for the conclusions he reached when he was a scholar. Most often, his critics have been confused about what -- exactly -- Judge Bork has said. They have misunderstood his criticism of the Court's _reasoning_ by equating it with criticism of the _results_. But Judge Bork's critical comments have ALWAYS been aimed at the reasoning of Supreme Court opinions -- and _never_ at their results. We must remember that it is reasons -- and not raw political power -- that justify what the Court does. Correct reasons give legitimacy to what the Court does. Bad reasons can transform even its best decisions into abuses of power.

Because he has been critical of some of the Court's past cases, his opponents have indulged in a simplistic prediction: If Judge Bork is on the Court, he'll vote to "roll back the clock" and massively repudiate the decisions whose reasoning he has questioned. But Senators -- _this isn't going to happen_.

As Judge Bork has repeatedly emphasized, it is one thing to ask whether the Court should _in the future_ recognize new rights that the Constitution doesn't specify. It is another matter entirely to ask the Court should deal with the rights that have -- even mistakenly -- been recognized in the past. Whether a precedent should be followed involves a set of considerations legitimately different from whether it should have been created in the first place. Even if a past case were a "mistake" it may very well be that it neither can nor should be undone. In some sense, overruling precedents is like trying to undo the consequences of a mistake. But we all know -- Judge Bork knows too -- that while we can learn from our mistakes we can't undo their consequences. A rigid notion that precedents ought to be binding just because they're precedents is of course unacceptable -- with such a notion we'd still be living in a Plessy v. Ferguson world. But precedents usually ought to be followed, even by judges who have been highly critical of them. And there is no inconsistency here with a philosophy of judicial restraint. We need not feel we have to undo the past in order to restrict the Court in the future to the enforcement of rights with genuine sources in the Constitution.

Judge Bork has also consistently emphasized another important aspect of his judicial philosophy: it is fully consistent with full and vigorous enforcement and protection of the rights that are in the Constitution. The Court needn't always be willing to create new rights in order to fulfill its role as guardian of our liberties and defender of the constitutional order. The Court's most basic function is to stand vigilant against encroachments of existing rights. This goes without saying. The Court must give these rights firm and consistent enforcement when the occasion arises. The Court must be willing to define their scope fully and expansively in the often hostile world. In addition, if the Court concludes that a claim lacks merit, it must carefully and thoroughly explain why. That Judge Bork's philosophy of judicial restraint embraces these essential components of judicial responsibility is plainly illustrated by his opinions as a circuit court judge. It is, quite frankly, difficult for me to believe that one could read these opinions and conclude otherwise. The opinions exemplify both Judge Bork's superb judicial craftsmanship and his resolute fairmindedness.

In the debates over this nomination, concern with specific outcomes has tended to take the place of attention to matters of judicial method. Questions about Judge Bork's judicial philosophy have distracted attention from equally important inquiries about whether the judicial obligation to explain has been adequately discharged. We forget at our peril, I think, that a stated rationale is the only purchase that any member of a court's constituency has upon its decision. If a court won't tell us how it reached its decisions, what were its premises of reasoning, what its main lines of authority, what its factual conclusions, then we cannot hope to be genuine participants in the court's future decision-making processes and the court will become, truly, accountable to no one. The obligation to explain, to give reasons, to fully articulate lines of analysis considered relevant is an obligation on which Judge Bork has never defaulted. Judge Bork's opinions don't merely announce their conclusions. They explain their results.

In short, when Judge Bork practices judicial restraint, he neither abdicates the judicial obligation to protect individual and minority rights, nor does he shrink from appropriate opportunities to expand those rights. And when he practices judicial restraint, he does so in the very finest tradition of his calling.

Senator DECONCINI. Thank you, Ms. BeVier. Thank you very much.

Mr. Levin.

TESTIMONY OF LEO LEVIN

Mr. LEVIN. Mr. Chairman, members of the committee, I am privileged to be here today. I have submitted a statement for the record.

Senator DECONCINI. Without objection, it will appear in the record.

Mr. LEVIN. Thank you. And I simply want to make, at this stage of the proceedings, two brief points in the oral presentation.

The first. I have come to know Judge Bork. I have come to know him, it began in professional associations, but we got to know him as a person.

The Judge Bork that I know has absolutely no resemblance whatsoever to the Judge Bork that is being caricatured in many places.

This person does not have an ounce of prejudice, racial, ethnic, religious, sexual, in his body, and I have no hesitation whatever on that score.

The second point that I should like to make, mindful of the time, and so on, is that Judge Bork himself, back in 1984, wrote in a footnote in the *Zech* case, that views he had expressed in academic life were—and I quote—"completely irrelevant to the function of a circuit judge." End of quote.

And I make these comments as an academician, mindful of the need, particularly in certain environments of being provocative, of demanding that there be a tension to other ideas.

And I would just like to say that by the same token, where precedent controls—and I think it is fairly clear that Judge Bork has reiterated his dedication to precedent—where precedent controls, the writing of the academician, however provocative, must, and I am confident, will give way in the decision of actual cases.

I should just like to say that I join my colleagues here, and any number of others who have submitted statements and testified, in warmly supporting the confirmation of Judge Robert H. Bork as an Associate Justice of the Supreme Court, confident that this is in the very best interests of the country.

Thank you very much.

[Prepared statement of Mr. Levin follows:]

STATEMENT
OF
A. LEO LEVIN

on the nomination of Honorable Robert H. Bork to be Associate Justice of the Supreme Court of the United States.

SENATE JUDICIARY COMMITTEE
HONORABLE JOSEPH BIDEN
Chairman
September 28, 1987

My names is A. Leo Levin. I serve as Leon Meltzer Professor of Law at the University of Pennsylvania. I first joined the Penn Law School faculty in 1949 and I have taught at the University of Pennsylvania since that time except for relatively brief periods at other academic institutions and rather more extended law-related government service.

I came to know Judge Bork a little over twelve years ago in the course of my duties as Executive Director of the Congressionally-created Commission on Revision of the Federal Court Appellate System. He was at that time Solicitor General of the United States. We became personal friends. He has been at our home and I have been at at his any number of times during the intervening years. I believe that I have come to know the man.

Judge Bork is a man of integrity, exceedingly bright, sensitive and deeply devoted to the federal judicial system. Moreover, he has known tragedy in his personal life. I do not believe that there is any racial, religious, ethnic, or sexual prejudice in the man. Indeed, I have seen evidence to the contrary. I believe that if confirmed he will serve with great distinction to the great benefit of the country.

The issues that the Supreme Court will deal with in the future can hardly be imagined. Certainly, given the authority of precedent, they will be different than those of the past. Justice Brennan, in an eloquent address, recently reminded us of the need to work now on developing the law that is to govern man in space. It will not be too many years before issues of the space age will come before the Supreme Court, a Court that surely will be different than the present Court and, one can hope, a Court no less distinguished. I believe that Robert Bork has the qualities to add lustre to that Court, a Court that one can confidently predict will build on the precedents developed by its predecessors, as Judge Bork has properly assured this Committee that he will do. Phrased differently, what the Court needs and what the country needs are the qualities of a Robert Bork.

During the course of our professional associations, from my first association with Judge Bork to this day, I have found him sincerely concerned with and devoted to the federal judicial system. It was on his initiative that Attorney General Levi appointed a departmental committee to study the problems of the operation of the federal judicial system, in one sense parallelling the work of the Hruska Commission, but actually broader in scope. Judge Bork chaired that committee and its report bears his name. This is not the occasion to detail the substance of his approach that commands increasing attention today. I am by no means suggesting that I admire Judge Bork because I agree with everything he says, even in that report. We have differed and continue to differ, on questions involving the structure of the federal judicial system, but my respect for Robert Bork has never been diminished and my admiration for him continues to increase.

As an academician, I should like to add a word about Robert Bork's non-judicial writing, and more particularly to his view of the role of the academic contrasted with the role of a judge. In 1984, in footnote 5 of Dronenburg v. Zech, 741 F.2d 1388, 1396 (D.C. 1984), he referred to views he had expressed "in academic life," adding that they were "completely irrelevant to the function of a circuit judge." By the same token, where precedent controls, writings of the academician--however provocative--must and, I believe, will give way. (The Zech case, it will be recalled, was the one that developed after "a 19-year-old seaman recruit" chose to break off his homosexual relationship with "a 27-year-old petty officer," with evidence of homosexual activity taking place in the barracks. Judge Bork refused to find a constitutional bar prohibiting the Navy from discharging the petty officer.)

I should like to associate myself with the analysis and the conclusions of Professor Daniel J. Meador, presented to this Committee, as extracted in the press, suggesting objective criteria that would be appropriate for the Committee to apply and concluding that Robert H. Bork merits confirmation. I concur emphatically in his conclusions.

I was present when Justice John Paul Stevens, addressing a very large group assembled at the Judicial Conference of the Eight Circuit this summer, quoted with enthusiastic approval from one of Judge Bork's opinions, and warmly applauded his nomination. It was a moving moment. I count myself privileged to be allowed to join in the chorus of lesser voices recommending confirmation.

Senator DeConcini. Thank you very much. Mr. Oaks. Would you please rise and raise your right hand.

Do you solemnly swear the testimony you are about to give to this committee is the truth, so help you God?

Mr. Oaks. I do.

Senator DeConcini. Be seated.

Mr. Oaks. I understand that you wish me to proceed at this point?

Senator DeConcini. Yes, sir. It is your turn and you have 5 minutes. Your full text. If it is more than that, we will print in the record as if given, and if you would please summarize, or whatever you care to say, sir.

TESTIMONY OF DALLIN H. OAKS

Mr. Oaks. Thank you. I welcome this opportunity, members of the committee, to testify in support of the confirmation of the Honorable Robert H. Bork.

I have known him for 31 years, carefully observing his work as a lawyer, a law professor, and a constitutional scholar.

My testimony is based on this long acquaintance and on my 30 years ’experience in the legal profession. My views are personal. I do not speak for my church or for any other organization.

Since my evaluation is a personal one I should state my own experience. I served for 1 year as a law clerk to Chief Justice Earl Warren of the U.S. Supreme Court.

Like Judge Bork, I am a graduate of the University of Chicago Law School. Like Judge Bork, I worked as an associate in the Chicago law firm then known as Kirkland, Ellis, Hodson, Chaffetz & Masters.

During my 3½ years with this law firm I worked closely with Robert H. Bork.

I left the Kirkland firm in the fall of 1961 to become a professor at the University of Chicago Law School, where I served for 10 years. During my last year at Chicago, I also served as executive director of the American Bar Foundation.

From 1971 to 1980, I was president of Brigham Young University. Then I served as a Justice of the Utah Supreme Court for over 3 years.

I resigned from the court to accept my present calling as a member of the Council of the Twelve Apostles of the Church of Jesus Christ of Latter Day Saints.

I am familiar with the scholarly work of Professor Robert H. Bork.

In my judgment, Robert H. Bork would make an outstanding Justice on the U.S. Supreme Court. He is highly intelligent. He is the product of a superior legal education.

Through long experience in different areas of the profession, he has proven his excellence in the kind of legal practice, scholarship, and public service, that has traditionally fitted persons for the effective performance of high judicial office.

He is a man of integrity who has adhered to the highest standards of the legal profession.

I have been saddened as some respected persons and organizations have characterized Judge Bork as an extremist, an enemy of legal rights that are vital to some citizens, and valued by all. These assertions are not well founded and do not serve the cause of thoughtful discourse on the qualifications of this nominee.

If Judge Bork's legal philosophy is so extreme, or his judicial performance so at odds with our constitutional tradition, how it is that he has written more than 100 majority opinions for the U.S. court of appeals without having a single reversal by the U.S. Supreme Court?

An appellate judge needs a coherent philosophy about the respective roles of the judicial branch and the legislative branch. Judge Bork has such a philosophy. He has articulated his ideas of judicial restraint with a clarity that is admirable, and certainly not self-serving.

I agree with his philosophy. It is essential to the preservation of our freedoms, and our Constitution, that our laws be made by lawmakers who are responsible to the people through election. Life-tenured judges should limit themselves to the interpretation of the laws and the Constitution, which is their constitutional function.

Judicial restraint also requires a judge to be respectful of precedent, even when it runs counter to his preferences and his own judicial philosophy.

As this committee knows from its extensive interrogation of Judge Bork, he is also sensitive to that important and sometimes countervailing requirement of judicial restraint. And a judge must be open minded. Judge Bork is.

He has the kind of humane qualities we need in judges whose decisions affect not only public institutions, but also the most intimate aspects of the private life of our citizens.

When we were young lawyers together in Chicago, I felt his concern. I would like to illustrate that with this example.

During the late 1950's, the period when Robert Bork and I were employed in the Kirkland firm in Chicago, I observed that the pattern of employment among large firms in that city was for Jewish law graduates to be employed by Jewish firms, and for non-Jewish graduates to be employed by non-Jewish firms.

The Kirkland firm was part of that pattern. In the early months of 1957, my classmate, Howard G. Krane, who was Jewish, was interviewed by the Kirkland firm. Considered on his merits, Krane would clearly have received an offer. He was a top graduate with law-review experience, and he showed every promise of being an outstanding lawyer.

Despite this he was brushed off and not offered employment because he was Jewish. When Bork learned about Krane's rejection he was incensed. Even though only an associate, without any formal voice in the hiring decisions of the firm, Bork determined to try to use the case of Howard Krane to change the firm's practice of excluding Jewish graduates from employment.

He talked to me about this intention. I assured him that Krane was an outstanding prospect whose credentials would make a good test case for his effort. I promised my support.

Bork went to the hiring partners of the law firm and took a strong position, that their failure to hire Krane because he was

Jewish was not only extremely shortsighted for a firm that was interested in top talent. It was also deeply offensive to some young lawyers the firm was obviously grooming for future leadership.

Two of these partners told me what had happened and asked for my position, I supported Robert Bork's position and Howard Krane was hired.

Today, Krane is a managing partner of that firm, Kirkland & Ellis, one of the nation's most prestigious.

I believe that Robert H. Bork will be an outstanding Justice on the U.S. Supreme Court and I urge that he be confirmed.

[Prepared statement follows:]

Dallin H. Oaks
Testimony before
the Senate Judiciary Committee
on the Proposed Confirmation of Judge Robert H. Bork
September 28, 1987

I welcome this opportunity to testify in support of the confirmation of the Honorable Robert H. Bork. I have known him for 31 years, carefully observing his work as a lawyer, a law professor, and a constitutional scholar. My testimony is based on this long acquaintance and on my 30 years' experience in the legal profession. My views are personal. I do not speak for my Church or for any other organization.

Since my evaluation is a personal one, I should state my own experience. I served for one year as a law clerk for Chief Justice Earl Warren of the United States Supreme Court. Like Judge Bork, I am a graduate of The University of Chicago Law School, and like Judge Bork I worked as an associate in the Chicago law firm then known as Kirkland, Ellis, Hodson, Chaffetz, and Masters. During my three and one-half years with this firm, I worked very closely with Robert H. Bork.

I left the Kirkland firm in the fall of 1961 to become a professor at The University of Chicago Law School, where I served for ten years. (Bork left that firm in 1962 to become a professor at Yale.) During my last year at Chicago, I also served as the Executive Director of the American Bar Foundation. From 1971 to 1980 I was the President of Brigham Young University, also teaching in its new law school. I served as a Justice of the Utah Supreme Court for over three years. I resigned from the Court to accept my present calling as a member of the Council of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints. During my work in the legal profession, I have studied the books, articles, and speeches of hundreds of legal scholars and judges. I am familiar with the scholarly work of Professor Robert H. Bork, and have used it in my own scholarship.

In my judgment, Robert H. Bork would make an outstanding Justice on the United States Supreme Court. He is highly intelligent. He is the product of a superior legal education. Through long experience in different areas of the profession, he has proven his excellence in the kind of legal practice, scholarship and public service that has traditionally fitted persons for the effective performance of high judicial office. He is a man of integrity who has adhered to the highest standards of the legal profession.

I have been saddened as some respected persons and organizations have characterized Judge Bork as an extremist, an enemy of legal rights that are vital to some groups of citizens and valued by all. These assertions are not well founded and do not serve the cause of thoughtful discourse on the qualifications of this nominee. If Judge Bork's legal philosophy is so extreme or his judicial performance so at odds with our constitutional tradition, how is it that he has written more than a hundred majority opinions for the United

States Court of Appeals without having one single reversal by the United States Supreme Court?

An appellate judge needs a coherent philosophy about the respective roles of the judicial branch and the legislative branch. Judge Bork has such a philosophy. He has articulated his ideas of judicial restraint with a clarity that is admirable and certainly not self-serving. I agree with his philosophy. It is essential to the preservation of our freedoms and our constitution that our laws be made by lawmakers who are responsible to the people through election. Life-tenured judges should limit themselves to the interpretation of the laws and the Constitution, which is their constitutional function.

Judicial restraint also requires a judge to be respectful of precedent, even when it runs counter to his preferences and his own legal philosophy. As this committee knows from its extensive interrogation of Judge Bork, he is also sensitive to that important and sometimes countervailing requirement of judicial restraint.

A judge must be open-minded--willing to weigh arguments that bear against his previous opinions and flexible enough to modify his prior positions, even his public ones, in response to new facts or more mature reflection. I have seen that open-mindedness and flexibility in Robert H. Bork. Some have characterized his willingness to change his mind as "confirmation conversion." The facts on his character and his public record show otherwise. He is an open-minded intellectual, not an expedient climber.

Robert H. Bork has the kind of humane qualities we need in judges whose decisions affect not only public institutions but also the most intimate aspects of the private life of our citizens. When we were young lawyers together in Chicago, I observed that he was a good husband and father. I also felt his concern that the content and administration of the law be such that it would serve the people as a whole, not just powerful special interest groups.

I will conclude by telling the Committee how Robert Bork reacted in a circumstance that shows his character and his concern for the principles of non-discrimination that have played such an important part in the progress of this nation and its people in the last half-century.

During the late 1950's, the period when Robert Bork and I were employed by the Kirkland firm in Chicago, I observed that the pattern of employment among large firms in that city was for Jewish law graduates to be employed by Jewish firms and for non-Jewish graduates to be employed by non-Jewish firms. The Kirkland firm was part of that pattern. In the early months of 1957, my classmate Howard G. Krane, who was Jewish, was interviewed by the Kirkland firm. Considered on his merits, Krane would clearly have received an offer. He was a top graduate with law review experience and he showed every promise of being an outstanding lawyer. Despite this, he was brushed off and not offered employment because he was Jewish.

When Bork learned about Krane's rejection, he was incensed. Even though only an associate, without any formal voice in the hiring decisions of the firm, Bork determined to try to use the case of Howard Krane to change the firm's practice of excluding Jewish law graduates from employment. He talked with me about his intention. I assured him that Krane was an outstanding prospect whose credentials would make a good test case for his effort. I promised my support.

Bork went to the hiring partners of the law firm and took a strong position that their failure to hire Krane because he was Jewish was not only extremely short-sighted for a firm that was interested in top talent. It was also deeply offensive to some young lawyers the firm was obviously grooming for future leadership. Two of these partners told me what had happened and asked for my opinion. I supported Robert Bork's position, and Howard Krane was hired. Today Krane is a managing partner of that firm, Kirkland and Ellis, one of the nation's most prestigious.

I believe that Judge Robert H. Bork will be an outstanding Justice on the United States Supreme Court. I urge that he be confirmed.

Senator **DeConcini**. Thank you, Mr. Oaks, and thank you, ladies and gentlemen. I have no questions prepared for you. We did not receive any of the statements here, quite frankly. That is not your fault because I understand some of you did not know when you were going to testify, but we have not received the statements.

I do appreciate the time that you have spent here. Obviously some of your personal relations with Judge Bork are indeed important. Because one of the problems this Senator faces is I did not know Judge Bork when he was up here for confirmation before. I never met him. I have only met him and seen him here for five days, and there is no question to me that personally knowing anyone who is up for confirmation, or consideration for any position, is far better than not knowing him.

I have had the benefit of knowing the other three nominees to the Supreme Court, and quite frankly, the decisions have been much easier for me to conclude, and who to ask. So I do not even know who to ask, and you have been asked and you have given your views and I appreciate that very much.

The Senator from Utah.

Senator **Hatch**. Thank you. It is my understanding that the Senator from Wyoming has to leave, so I will defer to him.

Senator **DeConcini**. The Senator from Wyoming.

Senator **Simpson**. Thank you very much, Orrin, and thank you, Mr. Chairman.

Well, indeed, it is certainly worthwhile hearing what you are telling us, and I know that some of the things you say you feel are repetitive, but the hammers of repetition are on the forge and have been for days here. A continual, a repetitive drumming about this man, always prefaced by the fact that he is just about the nicest guy they have ever met, and has not one shred of anything that would question his honesty or his integrity or his intellect. But. And then we hear it all, and always in the area of emotion, fear, guilt, or racism. It really is fascinating.

So I remember there is a phrase in politics: "There is no such thing as repetition." You can tell the same person 10 times how you feel on an issue, and on the 10th time they will tell you "I didn't know you felt that." That is the way it is in politics.

But if you drum it long enough and get it sandwiched in your evening news, and then between the evening news and the prime time, and here is an ad by someone as respected as Gregory Peck—to get right specific—saying that this man is in favor of "these things" which are repugnant to us all, that is the kind of stuff you are getting in this.

Too bad Gregory Peck did not read Judge Bork's record. That is unfortunate and a little sad. So emotion will always triumph over reason, but reason will always persist, and when it comes down to when all the players are in this game, all 100 of us, reason will persist and we will get this man confirmed, because there is no reason not to, not one single one.

I have approved others of the other faith, as everyone else has on this panel. Particularly, Mr. Oaks. I do not know how much more we could talk about Watergate, but it has almost reached the point of babble.

You were involved there. From your testimony, you have known Judge Bork. That is in the record. We have heard a great deal about Judge Bork's handling of the Watergate issues. You have given your firsthand knowledge about the involvement to others, not just here, but in other times.

We know all about it. There is not anybody that does not know anything about it. When I speak about it, I am not denigrating what happened. I am just saying we all know what happened and we are all pleased with the result. Let's move on. We never even brought it up in the two previous times when this judge was before this panel.

But you recall that that was the occasion, it was a holiday weekend, and Judge Bork called you, did he not?

Mr. OAKS. Yes, he did.

Senator SIMPSON. And it must have been soon after the firing, momentarily, was it not, that he began to seek a new special prosecutor? Tell me, just quickly, what that is, and I do not have much time, so——

Mr. OAKS. I think it was Monday, Senator. Bob Bork called me. We are long-time friends, as I have indicated. He said "I want some help getting a special prosecutor going."

He talked about the circumstances that he had been involved in, and about the stress he was under. He said he was calling from the office up in the Supreme Court. He did not have the use of his office in the Department of Justice, for practical reasons.

He said "I am making all my own calls; I am even fussing around with the phone book to try and get all the numbers. This is just incredible." It was just a few hours after the Saturday night massacre, as it is now called, and he was a friend in trouble; he was under a lot of stress. What he said was this: "I have got to get a Special Prosecutor going, somebody that the American public will trust, someone that will have instant credibility with everyone because of his stature in the legal profession, and someone who is tough, because this is a tough job. You would not believe the kind of pressures there are here. It has got to be a man of integrity and toughness who can carry the job through."

He said, "I think a President of the American Bar Association would have the kind of instant credibility that I need for this job, but I do not know the men who have been President of the American Bar Association, and I do not know which ones of them have the toughness and the other qualities that we have got to have to carry this job through."

"You know them." He knew that I had been executive director of the American Bar Foundation and knew a lot of the Presidents of the ABA. He said, "You know them. Who can do that job? Who can we trust, and who is tough enough to stand up to the pressure and carry the job through for the benefit of this country?"

And I mentioned Justice Lewis Powell, who was unavailable for obvious reasons. And I said the other man that is foremost in my mind for those credentials is Leon Jaworski.

He said, "I don't know him, but somebody else has mentioned his name."

And I said, "Well, you can take my word for it—he is the man who will do the job you want done."

And that was the essence of our conversation.

Senator SIMPSON. And that conversation took place when?

Mr. OAKS. To the best of my recollection, it was Monday morning following the Saturday. I say "to the best of my recollection" because I cannot date it with precision to the nearest 24 hours. I know it was not Sunday, because I was in my office at Brigham Young University when the call came, and I was never there on Sunday. I think it was Monday morning when he called me.

Senator SIMPSON. It was not Tuesday?

Mr. OAKS. It is possible it could have been Tuesday, but it was not later. I think it was Monday because of the description he gave of the pressure he was under, and the call being from the Supreme Court office. He sounded to me like a man who was in semi-hiding, trying to pull his life together and measure up to his responsibilities, without knowing who he could depend on without having his office geared up, people he could trust, and so on. It was a stressful call, and I did what I could to help.

Senator SIMPSON. Well, we have had so much here—sinister relations to the fact he waited until public opinion pushed him along and these things, and so there was little delay, in any event, when he called you; that is obvious.

Mr. OAKS. It was obvious to me.

Senator SIMPSON. And he was probably out front of the White House on this one—which was pretty risky business for him. But again, that is the kind of distortion that we get in this game from end to end, and especially on Watergate, because that is stuff that repels us all.

So the same old stuff, and I am glad you were there, and Lord knows what will happen to your testimony, but we will distort it in some way.

Senator DECONCINI. Thank you.

The Senator from Vermont.

Senator LEAHY. Thank you, Mr. Chairman.

I will be brief, because I know we have other people also waiting.

Professor BeVier—and I am probably not the first person to mispronounce your name, am I——

Ms. BEVIER. No. I doubt you will be the last.

Senator LEAHY. You are knowledgeable about first amendment issues, and that is the area that I have discussed at some length with Judge Bork. Did you have any chance to review his testimony on first amendment issues before us?

Ms. BEVIER. Yes, I have looked at it, Senator Leahy.

Senator LEAHY. There appears to be a change in his position on *Brandenburg* v. *Ohio*, certainly from his 1970 writings until here. He described *Brandenburg* earlier as being fundamentally wrong, but in his testimony here, he thinks *Brandenburg* is right.

How would you account for that change?

Ms. BEVIER. Well, I think that the best way to account for the change is to probably say—if it is a change, indeed—that what Judge Bork was doing by way of explanation of his present adherence to *Brandenburg* was attempting to speak to an issue that he had not thought through perhaps as a scholar.

Brandenburg could be criticized by someone who took at one time a narrow view of the protection of the first amendment, because as you know, it does extend protection of speech so that advocacy of unlawful action is protected. So in that sense as a scholar, one might say *Brandenburg* is fundamentally wrong.

When one begins, however, to think about what one has to do as a judge to protect the kind of speech we do care about, which is political speech, which all of us agree is at the core of the first amendment, which Judge Bork has never said was even vaguely unprotected, I think one can realize that——

Senator LEAHY. I am sorry. I did not understand. What was it he said was not unprotected?

Ms. BEVIER. Political speech.

Senator LEAHY. Political speech. I am sorry. I understood you to say "nonpolitical." You said "political." Okay.

Ms. BEVIER. If you begin as a judge to realize that what your job is is to protect the rights that clearly do exist, it seems that you can pretty easily begin to see that a rule like *Brandenburg* is necessary just to protect political speech, simply because it is so difficult in the context of situations in which speech might be prosecuted or punished——

Senator LEAHY. But he went well beyond again, a position that he has taken fairly consistently for a decade and a half, of calling *Brandenburg* fundamentally wrong and speaking of protection only of political speech. He did, following a series of questions here during the confirmation, considerably expand that view, did he not—and in fact, reject much of his earlier view—or do you see it that way?

Ms. BEVIER. Oh, no, I think that he did. I teach in the first amendment area, Senator Leahy——

Senator LEAHY. That is why I am asking you.

Ms. BEVIER [continuing]. Right, but what I want to preface my answer by saying to you is that the first thing I always tell my class is that the first amendment is a lot harder to understand than people realize, in terms of how it technically plays out as a series of legal rules.

But first of all, there are two things—one, what *Brandenburg* does as a rule to protect unpopular speakers in potentially incendiary situations or situations in which they might be subject to persecution for having unpopular views. That is one sort of first amendment kind of situation.

Another is the theoretical principle of whether or not the first amendment extends only to political speech. And on that, I think Judge Bork's views, in the fire of the intellectual debate to which those ideas have been subjected, have undergone a change; he has simply acknowledged his error and expanded his willingness to protect speech.

Senator LEAHY. Thank you.

Thank you, Mr. Chairman.

Senator DECONCINI. The Senator from Utah.

Senator HATCH. Thank you, Senator DeConcini.

President Oaks, let me just ask you a few questions. I do want to acknowledge your commendable record. You went over some of the things that you did before you went to your present ecclesiastical position, but I am one who believes that had you stayed in the private sector, so to speak, you may very well have been one of the nominees of the President yourself, and I think with an awful lot of support from all over the legal community as well as elsewhere.

Let me just say this, that you have indicated you have known Judge Bork professionally and personally for quite a few years, ever since law school. And as you know, Judge Bork has been attacked here, in the press, in television commercials, special interest group reports, full-page ads in the newspapers, as an unbending, rigid, ideologue.

Now, do you have any reason, having known him as long as you do, to believe that any of these accusations are true?

Mr. OAKS. I do not believe any of those accusations are true. I believe that Robert Bork, from my long knowledge of him and observation of his record and his work, is an open-minded intellectual, not an expedient climber. He has changed his mind, but any scholar worth his salt is going to change his mind on things.

Senator HATCH. Judge Bork has said again and again that judges should stick to interpreting the laws before them, whether it be constitutional or statutory, according to the meaning originally given to that particular law by its drafters, and not read into the law his or her own personal preferences or policy preferences, if you will.

Do you think this is way outside of the mainstream of American jurisprudence?

Mr. OAKS. No.

Senator HATCH. All right. What do you see as the dangers of judicial activism, where judges do read their own policy preferences into statutes and into the Constitution?

Mr. OAKS. It departs from the principle that I stated in my testimony, that the law ought to be made by lawmakers who are responsible to the people through the process of election. It tends toward a lawless society, or a government of men and women, rather than a government of laws and legal rules and predictable outcomes.

Senator HATCH. Do you think that the Founders ever meant that the judicial branch should practice that kind of activism or to exercise that kind of power?

Mr. OAKS. Not in my view.

Senator HATCH. Well, thank you. I appreciate having your testimony. I was interested in your comments about Judge Bork and his worries and concerns about resolving his dilemma of getting somebody appointed who would be of stature, of such stature that the American people would realize that he, as the acting head at that particular point, was going to go ahead and do what was right with regard to Watergate. And I think that history speaks well of him in that regard, because by appointing Jaworski, of course, history shows that Jaworski did a terrific job of resolving the whole Watergate affair. And I think your testimony is crucial on that, and I was interested in hearing it, because I know of your reputation, I know you personally very well, and I know that people can believe every word you say on any subject. So I was pleased to be able to hear that here today.

Let me go to Professor Monaghan, if I can.

There has been considerable debate here on this committee over Judge Bork's approach to the equal protection clause and what he calls the reasonable basis test.

Now, we have been told by some that the reasonable basis test that he outlined is just the old rational basis test with a new name, and that under this test, most instances of sex discrimination would be sustained—at least, that is the implication by certain members of the committee as well as others outside.

Now, Judge Bork on the other hand says it is not the same as the old rational basis test, and that under his analysis, all government sex distinctions or classifications would be impermissible, except for one or two that he enumerated; he could not think of any others.

Would you please give us your views on this issue?

Mr. MONAGHAN. Well, I think that part of the difficulty that Judge Bork has is that historically the rational basis test has been manipulated by judges. Nobody could tell you what the structure of the rational basis test is.

Recent Supreme Court cases have proffered a much tougher rational basis test. They do not look for simply a logical connection. What they require is a plausible connection.

I think that the case that was referred to by Senator Specter is a good example of that, in his examination of Judge Bork. I think that under my view, most sex discriminations would be invalid under the 14th amendment. They would be unreasonable given contemporary social standards. But I might point out to the committee that one of the difficulties that somebody has who takes the 14th amendment seriously is that the 14th amendment itself contains a sex discrimination, in its body, in section 2. I noticed that one set of witnesses that came down here to testify, consisted of four women. No one of them seemed to know that the second section of the 14th amendment itself contains a sex discrimination.

But I do think it is fair to say that under Judge Bork's view and under my view, the rational basis test—I would call it the reasonable basis test—would condemn sex-based discriminations.

Senator HATCH. I notice that my time is up. I would like to continue this panel, but I will just wait for the next round.

Senator LEAHY. I understand that you would want another round, which you will have, of course, and will yield now to Senator Heflin.

Senator HEFLIN. Professor Levin, I particularly want to welcome you. You have been a friend of mine for a long time, and are now professor emeritus at the University of Pennsylvania Law School; but your great service as director of the federal judicial center was remarkable. That is a center that deals with the education of judges, research, and other aspects of our federal system. And I suppose really, when I get to thinking about it, you have probably testified before this Senate Judiciary Committee in the last 7 or 8 years more than any other living human being, I believe. You have been here quite frequently. But I am delighted to see you.

I, of course, have listened to questions and asked questions, and we have rehashed and rehashed and rehashed practically the same thing. However, I came across a speech of Judge Bork's over the weekend that I had not seen, and I do not believe it has been inuired about. This was a speech at the Pound Revisited Conference. I believe you were there, and I was there—back around 1976 in St. Paul. The speech was entitled, "Dealing with the Overload in Arti-le III Courts." I realize you have not seen this piece, but Judge Bork, I think, has spent a good deal of time trying to figure out ways of meeting the problem of the overload of the courts, and at hat time had come up with some novel ideas. Some, I agreed with; ome, I did not. Of course, the one being discussed the most at that ime was diversity cases, removing them from the jurisdiction of he federal court, which in his speech, I believe he thinks would be a good idea. I might differ with him on that.

He then had some types of cases that he thought could be handled by an article I judge as opposed to an article III. Of course, the public might not understand, but article III are lifetime, Presiden-ially appointed, and Senate-confirmed judges. Article I's are those hat are not of that type. And there are some questions about what hey can consider and not consider.

But involved in it, he said the type of class or category of cases hat he had in mind that could be perhaps handled by the article I udge, the administrative law judge, rather than the article III udge, and therefore take that work load away from the article III ourts, would be such cases as the Social Security laws, National Environmental Policy Act, the Clean Air Act, the Water Pollution Control Act, Consumer Product Safety Act, Truth-in-Lending Act, Federal Employees Liability Act, Food Stamp Act and other examples could be found. I suspect that cases under the Mine Safety Act nd the Occupational Safety and Health Act would qualify.

Well, of course, that is largely a matter that is left to the Con-ress to make its determination as to what type of case they have. But I do not believe anything has moved relative to that concept. n your experience with Judge Bork, how do you classify him in he area of the administration of justice—he would become a part f the Judicial Conference, I suppose, or at least could become part f the Judicial Conference of the United States, and then of course would review the work of the Judicial Conference of the United States. How would you describe him in this area of administration f justice and towards ideas?

Now, I notice that he is against the National Court of Appeals; ou are for it, and I am for the National Court of Appeals. But give s your overall view relative to that from your perspective.

Mr. LEVIN. Thank you, Senator Heflin. I appreciate those warm emarks, and I am pleased for this opportunity.

In my submitted statement, which apparently has not arrived, I made some reference to the committee appointed by Attorney Gen-ral Levi to deal with some of these problems and make recommen-ations. And the speech at the Pound Conference by Judge Bork rew out of that committee, which he chaired, includes some chal-nging ideas. Some of those ideas, let me say, have resurfaced now, nd there is increased attention to them. Which ones are good, hich ones are viable, will depend on a number of things, but I ome to the summary. I think Judge Bork has been passionately edicated and devoted to the desire to see that the federal judicial ystem works not only in theory but in fact, to the advantage of he disadvantaged. I think that is one of the things that concerned him about the amount of time and effort that goes into these Social Security appeals, not only from the perspective of the article III judges, but of the litigants.

I think he has been creative, I think he has been dedicated to try and see improvements. And over the years, I must say, my respect for him even on things on which we disagree has increased rather than diminished. At times, I am inclined to think he is more mainstream on some of those things than I have, although I wish it were changed around, in terms of the votes.

He has been just superb in that area, and no matter what he gets involved with formally should he be confirmed, the influence of a Justice on the whole system could be very significant. I think there is much laudable in his record to date in that area.

Senator HEFLIN. Thank you, sir.

Senator LEAHY. The Senator from South Carolina; did you have any questions of the gentlemen?

Senator THURMOND. I am going to yield temporarily.

Senator LEAHY. The Senator from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman.

Professor Monaghan, I was interested in your comment that you had talked to Judge Bork prior to the time that he came here and that you had insights into the views that he held on constitutional law. And I would be interested to know if you had discussed with him at any occasion prior to his coming here—if you care to tell us; I do not wish to pry into any conversations which you might consider confidential; I know they are not privileged, but if you have a view that they are confidential, I would not want to pry—but I am interested to know, again, if you care to tell us, whether you had discussed with him a view that equal protection of the law, for example, applied beyond race, applied beyond the ethnic consideration prior to the time he came here a week ago Tuesday.

Mr. MONAGHAN. I have had, in the last 2 years, at least four conversations with Judge Bork at some sustained length about law. One of those conversations took place after his nomination, at which point I was invited down to discuss the subject of constitutional law with him, and he was a captive audience, so I just hammered him at that point.

But the matter to which you refer, it is very curious, but I can tell you the exact date on which it occurred and even the hour on which it occurred—April 15 of this year at a moot court at Columbia University Law School, sometime after 6 o'clock in the evening, at the bar. And the reason I know that is because I had just completed an article on original intent, precedent, and the written Constitution, and I was explaining to Judge Bork how the paper had started. This was a subject of considerable interest to him. And I pointed out to him that I thought that *Brown* v. *Board of Education* was quite inconsistent with the original intent of the framers—not a very fashionable view.

And it was in that context that Judge——

Senator SPECTER. You say it is not very fashionable?

Mr. MONAGHAN. It is not a very fashionable view, although——

Senator SPECTER. Are you familiar with Judge Bork's—well, I am sure you are—with his view that *Brown* v. *Board* is consistent with the original intent?

Mr. **Monaghan**. Yes, right. That is right. It does not happen to be my view.

And I might point out that I opened the article by quoting a statement from Larry Tribe along that line. "'It is simply a fact that those who wrote and ratified the 14th amendment believed that it would permit racial segregation in the public schools.' So states Professor Tribe." And I think that that is the fact.

Well, at this point, Judge Bork threw up his hands and said that it is far too late in the day to take that kind of a position, and in fact, at that point I said to him yes—just in substance—that, yes, the 14th amendment must be understood to condemn the equal protection clause, any unreasonable legislation, a proposition in which he acknowledged yes.

And this is a——

Senator **Specter**. Well, that is in a racial context, without——

Mr. **Monaghan**. No, no. This was meant generally. He made the statement generally, any unreasonable classification.

Senator **Specter**. Well, did you discuss the applicability of equal protection to women?

Mr. **Monaghan**. No. The conversation at that point ended, on that subject, and moved on to something else.

Senator **Specter**. Well, I do not know, obviously, the full extent of the conversation, but to the extent that you have described it so far, it does not pick up with specificity the application of equal protection to illegitimates, for example, or to indigents.

Mr. **Monaghan**. That is right, yes; I agree with that.

Senator **Specter**. I would be interested to know if you ever had a conversation with him where he said that his view was that equal protection did apply to those categories.

Mr. **Monaghan**. No. Just the general reasonableness classification, and that is what I think his view is.

Senator **Specter**. Professor Levin, you made the comment that you believe that Judge Bork would follow precedent, contrary to any of his academic writings, in the event there was any conflict.

I do not know if you have had an opportunity to hear some of the discussions we have had on the issue illustrative, say, of the clear and present danger test, and Judge Bork has said that he is prepared to apply accepted law, but he has a philosophical disagreement with the clear and present danger test. And we moved beyond *Brandenburg*—and I know you know these cases like the back of your hand—we then talked about the *Hess* case. And when I then sought to summarize and say, well, then, you are committed to follow *Brandenburg* and *Hess*, he said, "No, I am not committed to following *Hess*. I consider *Hess* to be an obscenity case."

And I raise this line because the Supreme Court considered *Hess* to be a speech case, clear and present danger case, and Judge Bork, in some of his prior writings, had as well.

The question that I have is, aside from academic writings—put those aside, as you have already testified to—where a man has a deep philosophical view—and Judge Bork has expressed very deep philosophical views—what is the reality, when the next case comes up on speech, clear and present danger, that the doctrine can be applied of *Brandenburg*, especially in the light of his questioning whether *Hess* is a clear and present danger test and whether he can apply the Holmes clear and present danger test to *Hess*? I would be interested in your views as to how he would function if confirmed as a Justice on that.

Mr. Levin. Senator, let me, really because of my lack of competence, not deal with the specific, but deal with what I think is a fair intendment, both of the question and what I get out of some of his judicial writings on this point——

Senator Specter. That would be fine.

Mr. Levin [continuing]. The *Ollman* case, for example.

I think Judge Bork is strongly committed that once a value has been identified—and I think that is where precedent counts—to say to it, okay, we are going to apply what is needed in today's world to make that value a reality, even though it encompasses situations never intended earlier. And I think for myself—and I have a kind of confidence in this—that taking a particular approach, and particularly in first amendment, and particularly as I gather the whole spirit in which he wrote on that in the *Ollman* case, which divided the court of appeals so, I think he is dedicated to the importance of first amendment values. Having identified them, he then moves on to what is needed today to do it.

I think he would take precedent in terms of this is things that the Court has agreed to protect. Now, I cannot speak for every, single situation that would come up, nor can any of us be assured of what might come.

I think the basic values the man has, which include the importance of precedent, I would feel far more confident about how he would proceed to develop these things than I could out of examining the particular analysis of case A and case B and what would happen.

I think there is a tremendous amount of intellectual integrity. I may have caught that bit of questioning on a car radio. I was tremendously impressed with it, I must say. I think some of the hearings have gone to new heights. But there is this tremendous—I detected there a kind of tremendous concern not to overstate, to be completely intellectually honest, and not to make a kind of mild commitment of any sort. And that is what I detected at the time, riding along the highway.

Senator Specter. Thank you very much, Professor Levin.

Senator Leahy. The Senator from Pennsylvania's time is up. I will waive my second round of questioning and yield to the Senator from Utah, who had requested a second round.

Senator Hatch. Thank you so much. I appreciate that, Senator.

Let me go back to Professor Monaghan again, because I think it is important we establish some of these things, and I think you are really very fine to answer some of these questions. I have a lot of respect for you personally—and of course, all of you on this panel.

Because Judge Bork does not favor giving one nonracial group more favorable protection than another, he has been accused of not covering women in his viewpoints. Can you explain the distinction between the coverage of the equal protection clause and the standard of protection under the clause; and then would you answer this question: Would Judge Bork cover women?

Mr. Monaghan. Well, the answer to the second question first is that, of course, he would cover women. As I understand Judge

Bork's protection analysis, he takes race as the core case, and he says if there is a racial classification, the Government must justify that by the highest standard known to the law. No racial classification is good at least if it disadvantages blacks. And I think it is a mistake to assume that Judge Bork has made up his mind on affirmative action, but let me put that out of the way.

If a racial classification burdens or disadvantages blacks, that is the core of the amendment. He is certainly right about that historically. In the slaughterhouse cases, it was doubted that anything else was covered but racial classifications. But in any event, Judge Bork would then require that the justification be a compelling or overriding one.

Now, he recognizes from that point on, as I recognize, as does the rest of the universe, that the equal protection clause can then be used against any other kind of a classification—illegitimates, children, women—but the standard drops at that point; the standard drops to the reasonable basis standard, which is to say that any classification that hurts anybody has to be justified by the Government. The Government must show it rests upon some reasonable basis. And that in a nutshell is, I think, Judge Bork's view.

I do not really understand why it is that Senator Specter thinks there is a real problem about what Judge Bork will do with women. Of course, they are within the ambit of the amendment.

Senator **Hatch**. That is interesting, Professor Monaghan. Judge Bork has said that judges who believe in original intent are particularly in need of a strong belief in precedent, or theory of precedent of stare decisis. Do you agree with that?

Mr. **Monaghan**. Yes. I have a 96-page paper here on that point; yes, I do. I think the fact is that there has been a great deal of departure from original intent. There cannot be any judge in America whose only analytical construct is original intent. He or she must take into account, even if you are predisposed toward original intent, as I am, you must take into account the fact that history counts; so you have to have a theory of precedent, also.

Senator **Hatch**. Profesor, define "judicial activism" for us.

Mr. **Monaghan**. Well, it would be—I guess I could put it to you in these terms. Judge Bork and his critics agree on a great many things. Judge Bork and his critics both agree that the rights that are secured in the Constitution have to be enforced. These are fundamental rights. The Government can only interfere if there is an overriding justification for the interference. That is freedom of religion, freedom of speech.

Judge Bork and his critics agree on a second proposition, namely, that all Government action that hurts anybody has to be justified, even if no fundamental right is involved, by a reasonable basis, a rational justification for the Government's action.

Where Judge Bork and his critics divide is the extent to which it is proper for judges to themselves write a second Bill of Rights, because once the judges go outside the Constitution and say something is a fundamental right, that means it cannot be interfered with by the Government unless there is an overriding justification.

I will give you an example of what Judge Bork objects to, and as a matter of fact this committee—if you do not mind my saying so—if this committee would read some of the work of Judge Bork's critics, rather than Judge Bork, I think it would help illuminate who is in the mainstream and who is not.

But let me——

Senator HATCH. Boy, do I agree with that.

Mr. MONAGHAN. Let me identify what some of his critics—and these are only people who have testified here—have to say about the judges' role.

Now, these critics fundamentally would convert the 14th amendment into a seminar on political philosophy. And I have written this because I once wrote an article called "Our Perfect Constitution" in which I catalogued some of the people that neither Judge Bork nor I agree with—although I want to say by way of preface, I would confirm all of these people, although I would appoint none of them.

Professor Tribe elaborates—this is the way Professor Tribe starts his textbook. He is not content simply to describe the Constitution. He starts in an avowed effort to construct a more just constitutional order. Professor Tribe elaborates a wide range of equality and autonomy rights.

His colleague, Professor Michelman, has devoted much of his——

Senator HATCH. That does point up Professor Tribe fairly well. He is a very, very activist, very, very intelligent, bright guy; there is no question, but there is no question he is an activist.

Mr. MONAGHAN. Yes. And with no devotion to original intent, I might add.

Senator HATCH. There is no question about that.

Mr. MONAGHAN. Although in fairness to Professor Tribe, he would deny that.

Senator HATCH. Yes, he would.

Mr. MONAGHAN. Professor Michelman is an even more interesting case. He has devoted most of his academic career to cementing the union between the distributional patterns of the welfare state and the Federal Constitution. And then it goes on. But I want to get a few people in particular so that you can see the gap between then and Judge Bork.

Professor Fiss, who testified against Judge Bork, argues that the court should give, "concrete meaning and application to those values that give our society an identity and inner coherence."

Now, the notion that judges of the Supreme Court are selected and have the competence to do that, five elderly judges—tomorrow you will hear testimony, apparently, from Professor David Richards of New York University Law School. He argues that the Court should apply the contract theory and moral theory of Professor Rawls' "A Theory of Justice." Professor Rawls is a professor at the Harvard School of Philosophy. So far as I know, he was not at the Convention; he did not show up at the 14th amendment debates either.

So what you find here is, on the one side, people who fundamentally think that the 14th amendment is a platform for political philosophy. And on the other hand you have a whole category of people who think that the 14th amendment has to be construed in accordance with its historical purpose.

I do not understand how these writers, such as Professor Fiss can excommunicate the rest of us. He is hurling anathemas at us. He is on one side of the stream, and we are on the other side of the stream. But until today, I did not realize there was an orthodoxy.

Senator HATCH. Well, let me just say this, Professor. You say that you have never in your life voted for a Republican.

Mr. MONAGHAN. That is right. I voted for Senator Kennedy three or four times—but only once at every election. [Laughter.]

Senator HATCH. Well, your political preferences are obviously liberal; is that a fair way of categorizing it?

Mr. MONAGHAN. I like to consider myself a liberal Democrat, yes.

Senator HATCH. Okay. Then how in the world can you be opposed to judicial activism, with all these leading lights on this committee who are liberal?

Mr. MONAGHAN. Well, it was an easy—and that really goes to the root of the matter—but it was easily understood when I went to law school that politics was one thing—one could be a liberal or one could be a conservative—and that constitutional law was something else again; and neither the liberals nor the conservatives owned the Constitution.

But I will tell you what is going on in the law schools. Increasingly among liberal academics, there is a distrust of politics. The liberals have——

Senator HATCH. It is not limited to them, by the way.

Mr. MONAGHAN. No, no, no. I understand that. Most of this objection could be turned against conservatives, also.

Senator HATCH. True.

Mr. MONAGHAN. But the liberals, having decided that it is difficult to win elections, have decided that they might as well—who needs an election if you have control of the Supreme Court, basically?

So I think that in some sense, Judge Bork—if I may make one more comment, Senator. There is a book by Stephen Macedo called "The New Right Versus the Constitution."

Senator HATCH. I have seen that.

Mr. MONAGHAN. And I open this book, and I read this book, and it is an attack on—guess who—Judge Bork as an example of the new right. It turns out that Judge Bork's great defect is that he believes in democratic government. Judge Bork in this book is being criticized by the far right for showing too much deference to the democratic processes. Judge Bork is criticized from the far right, from the left.

I would like to think that he is at least in the mainstream.

Senator HATCH. Professor, Judge Bork has said that he believes that laws should be interpreted to give effect to the understanding of the lawmakers themselves. Some people have told us that this interpretation is wholly inadequate, or at least inadequate.

Now, could you lay out for us some of the alternative methods of interpretation? And if a judge does not look to the original understanding of the law or of those who made the law, then what does he look to?

Mr. MONAGHAN. Well, I think I will give you a short answer rather than go into the theory of language philosophy. But I agree with the thrust of the question, that the judge is supposed to obey the intention of those who enacted the law; I agree with that. The trouble with the theory that—you know it is very easy to take shots at original intent theory and nobody knows that any better than I do, and in this piece that I have written, I have given up a lot of ground in this.

The same thing is true of people who think you do not rely on original intent. You can take an awful lot of shots at those, and that is what happens in the law reviews.

There are two big tugs of war, like two warships out there firing at each other. Both can hit the other side, and neither seems to be able to——

In fairness, original intent is a theory that will not solve the problems, either. Neither will original intent and stare decisis solve the problems.

The point to see is that there is not any theory that will solve all these problems, and the critical question then is not whether Judge Bork is right in having some philosophy, but the question is whether he is in the mainstream.

And in that regard, he has shown a capacity to change. The short answer to Senator Leahy's question was—oh, Senator Leahy is no there—is that this 1971 free speech article is a very bad article.

And Judge Bork has been pounded by his critics on it, and he has changed his mind.

Senator Hatch. I remember where—wasn't it Professor Tushnet who criticized the explicit 35-year-old eligibility requirement of the Constitution, and said all you need is to establish that he or she is of sufficient maturity, even though the Constitution is absolutely explicit on how old the President has to be.

Well, I do not mean to take more time but I really would like to.

Senator DeConcini. Senator—yes, it is. The Senator from South Carolina has one question but he says he is more than happy to wait until the Senator from Utah is finished.

Senator Thurmond. You can go ahead. It is all right with me.

Senator DeConcini. So the Senator from Utah can continue.

Senator Hatch. This is a terrific——

Senator DeConcini. Although would the Senator yield just because——

Senator Hatch. I sure would. I would be delighted to, any time, Senator DeConcini.

Senator DeConcini. Professor Monaghan mentioned something of interest. Did I misunderstand you? You said that there is a group of liberal law professors trying to rule this country through the Supreme Court, or did I——

Mr. Monaghan. Oh, no, no. No, no.

Senator DeConcini. What did you say?

Mr. Monaghan. No, no, nothing so grandiose as a conspiracy. No. I think that what has happened—and I think you see this in the work of people—of various of Judge Bork's critics.

I think what you see is among the liberals—you see, it used to be interesting to join two words—liberal Democrats. Now in fact that is not one idea: it is two ideas.

And there has been an increasing tendency among academic liberal Democrats to emphasize the values of liberalism as against the values of democratic government.

Senator **DeConcini**. But is this relative to what your statement was about liberal law professors trying to govern through the Supreme Court? Or did I just totally misunderstand what you said?

Mr. **Monaghan**. Well, if I conveyed that impression that is—I misspoke.

Senator **DeConcini**. What was the reference you were making about liberal law professors trying to change the Constitution through the Court?

You did not say that?

Mr. **Monaghan**. No—I am sorry. Maybe I can respond in this fashion.

Senator **DeConcini**. I just missed it. I am sorry.

Mr. **Monaghan**. Well, I think it is I who missed it and misspoke. I would say that there are a group of liberal law professors who believe that original intent theory, such as I espouse it, or as does Judge Bork, is totally inadequate, and the role of precedent is totally inadequate, and that what the 14th amendment was designed to do, or should be read to do—one of the two, and they take two different sides—is to authorize the judges of the Supreme Court to develop sound conceptions of moral philosophy——

Senator **DeConcini**. On anything?

Mr. **Monaghan**. Well, they would not go that far. That would be to characterize their view. On what they would describe as fundamental issues.

And then they would take the position that the Court should impose those against the contrary preferences of the legislation.

And if you read the law reviews today, what you find is a great deal of discussion about moral philosophy. In Professor Fiss, and in Professor Perry, you find people who are trying to establish a moral vision and there is a great deal of dispute between them.

Now that is a perfectly legitimate conception of what constitutional law is all about in my view, but it is not the only one.

Senator **DeConcini**. You are saying that is legitimate, particularly in light of the law review, or the environment of a law school and a professor in being provocative, or whatever you may term it as?

Mr. **Monaghan**. No, I would go further. If someone were nominated to the Supreme Court—although I would not make the nomination—if someone were nominated to the Supreme Court who held that view, I would vote to confirm them.

Senator **DeConcini**. You would?

Mr. **Monaghan**. I would vote to confirm.

Senator **DeConcini**. Thank you for the clarification.

The Senator from Utah.

Senator **Hatch**. Thank you, Senator DeConcini. That was helpful, too.

Now Professor BeVier, let me just turn to you for a few minutes, okay? You have authored a number of articles on the first amendment's guarantee of free speech, is that right?

Ms. **BeVier**. Yes.

Senator **Hatch**. You are recognized as an expert in that area. I do not think there is any question about that.

Now, are you familiar with Judge Bork's circuit court decisions dealing with the first amendment in the *Brown* v. *WMATA*, and *Ollman* v. *Evans?*

Ms. BeVier. I certainly am.

Senator Hatch. All right. Would you characterize those decisions as pro free speech?

Ms. BeVier. Well, they are pro free speech, absolutely. What they demonstrate is, I think, his ability to take the law of the first amendment and to enforce it in a very sympathetic way. Not merely that, but to explain how it is that he is going it, and why he is reaching his decision.

In *Ollman* v. *Evans*, which is a case I know you have talked a lot about, what is as remarkable about Judge Bork's opinion as the result he reaches, is his very careful explanation of why it is, in the world in which we presently live, that the standard announced by the majority was not quite adequate to meet the problems, and why he is convinced that in this context we need additional protection.

So, yes, I think they are very sympathetic to free speech.

Senator Hatch. What about his decision in *Finzer* v. *Barry*? Would you consider that to be in the mainstream?

Ms. BeVier. Oh, it is absolutely in the mainstream, and I think that——

Senator Hatch. That was the case where he found that the Government could forbid a group of protesters from demonstrating in front of the Soviet and Nicaraguan embassies.

Ms. BeVier. That is right. It was not merely in the mainstream, but I think it is very—I think it mischaracterizes a judge's function to say that whenever a first amendment claim comes before the court they are unsympathetic to the first amendment if the first amendment claimant does not win.

I think in *Finzer* v. *Barry*, for example, Judge Bork is enormously careful to explain what it is that he sees are the appropriate reasons why this particular claimant to a first amendment right ought not to be given the Court's sympathy.

Senator Hatch. Would you mind turning to Senator Humphrey?

Senator DeConcini. I do not want to overlook the Senator from South Carolina, if he cares to ask his questions.

Senator Thurmond. I will wait to ask my one question.

Senator DeConcini. The Senator from New Hampshire.

Senator Humphrey. Mr. Chairman, I just got here. I do not have any questions at this point.

Senator DeConcini. All right. Would you like to let the Senator from Utah know when you want to do it. I do not want to curtail the fine questioning of the Senator from Utah, but we do have two more panels, three more witnesses. I wonder if he has some idea of how long he thinks he will be.

Senator Hatch. I do not think I will be much more than 5 more minutes. I would like to finish with Professor BeVier.

Senator DeConcini. That is quite satisfactory.

Senator Hatch. And I do have some questions for Mr. Bator, but I may not have time to ask those.

Senator DeConcini. Please continue.

Senator **Hatch**. And of course I want to express my regard for my old friend, Leo Levin, and for the great work he has done around here.

Well, the fact is that *Finzer* v. *Barry* did not indicate that he would grind down or destroy our first amendment freedoms.

Ms. **BeVier**. Quite the contrary.

Senator **Thurmond**. Speak up so we can hear you.

Ms. **BeVier**. I said quite the contrary.

Senator **Hatch**. Well, it really was just saying that the first amendment is not absolute, that there are some circumstances, when, on balance, the Government is justified in placing some limitations on the exercise of the right, and would that be in the mainstream?

Ms. **BeVier**. Oh, that is—yes, it is in the mainstream. Of course.

Senator **Hatch**. As a matter of fact, isn't it true that those who claim that the first amendment is an absolute are themselves out of the mainstream?

Ms. **BeVier**. Oh, I think that that is definitely true, Senator.

Senator **Hatch**. I see a lot of heads going up and down there.

Ms. **BeVier**. There is no question that the first amendment needs to be applied by judges in a way that is sympathetic not merely to the claims of first amendment protestors but also to the claims of legitimate concerns of Government.

One has to remember, in *Finzer,* just as an example, it was only within 500 feet of embassies that these particular protests had been banned. They had not been banned every place else. There were lots of alternative opportunities to engage in the same kind of discussion.

Senator **Hatch**. Right. Well, I have a lot of questions for you also, Mr. Bator, but let me just ask you one.

Let's look beyond this particular nomination for a moment. What do you think the consequences would be, or will be, for the strength and the independence of the judiciary, if this particular nomination is defeated for the reasons that have been advanced thus far by all of the witnesses?

Mr. **Bator**. I think the consequences would be very sad, because I think that the precedent that would be set is that a nomination of the greatest possible distinction, in terms of intellectual and professional capacities, and in terms of moral integrity, can be done in, can be hounded to death on the basis of what are very short-range and partisan considerations.

I think what we would see is a precedent that says the Supreme Court is sort of owned by a single set of values.

There is a large mainstream here, Senator. The mainstream includes people with whom I disagree, who feel that the Constitution is so vague, that the judges should have a very broad discretion to interpret it, to step in, and to expand rights, and to right wrongs.

That is a very important tradition, but it is only one tradition, and there is another tradition which says that the judges must stick more strictly to the text, to the structure, to the original purpose, and that it is for the political branches beyond that narrow range to protect the people's liberties and rights, and interests.

Both of these are in the mainstream. And what we are seeing today is really, I think, a very sad and aggressive effort to excommunicate—as Professor Monaghan said—all who do not agree with a single narrow and partisan version of what the Constitution must mean.

Every one of the cases which has been set up here as a touchstone for whether you are a right-minded person, or whether you are to be cast out as irremediably wrong headed—every one of those was itself a very controversial case—most of them 5 to 4, 6 to 3.

Every one of the positions which has been denounced here as improper, and wrong headed, and as showing no allegiance to the Constitution—every one of those positions was a position to which judges like Black and Harlan, and Frankfurter, and Learned Hand adhered. Are we now to take the position that they are not entitled to be in the mainstream, and that they should not have served on the Supreme Court?

What we are seeing here is the establishment of a narrow and partisan orthodoxy, as representing the only view that is to be allowed, and I think for the Senate to accept that would be very sad.

Senator HATCH. President Oaks, let me just ask you one other question.

Mr. OAKS. Yes, sir.

Senator HATCH. Now you wrote what is still known as the leading article on the exclusionary rule.

I would like you to summarize your conclusions in that article, and this next question may—it is part of the total question and may be a little bit unfair. But I would just like to ask you to share your view of how Judge Bork's appointment might influence the course of criminal law in general.

Mr. OAKS. Senator, I would like to do that.

Senator HATCH. Could I interrupt you just to add a little bit more. One of the sides of this that has not been brought out is that the American people have been very concerned, as I see it, the polls show, and politics have shown through the years, that they are very concerned about the rife criminal activity in our society, especially with regard to the dissemination of drugs, violent crime, and organized crime, and the lack of stringent anticriminal activities in our society.

And also, they have been very concerned with some of the decisions of the Supreme Court through the years with regard to law-and-order issues.

And so I think it is important to contrast, if we can, if you would care to, what this man might do if he gets on the Supreme Court, in the area of law and order.

Mr. OAKS. The thrust of the article you refer to was that the basis of the exclusionary rule is deterrence, and that the deterrence promise had not been established, and seemed to be questionable and ought to be looked at critically instead of being accepted on the basis of a kind of orthodoxy that forbade disagreement, something along the lines of what Mr. Bator has referred to in relation to the orthodoxy, or quasi-orthodoxy, that seems to be pressing itself forward for recognition here.

The impact of that philosophy was simply to look hard at whether the exclusionary rule is performing its role, and to modify the judicially imposed exclusionary rule as the facts would warrant, but not to consider the whole thing immune from investigation.

I think that probably is the kind of view that an open-minded intellectual would take. At least that is what I thought when I wrote the article. Whether Judge Bork would agree with that, or not, is for him to say. I have never discussed it with him. I expect that would be his kind of view because he has been quite open-minded and quite critical of some of the prevailing orthodoxies of judicial activism.

Senator HATCH. Would you care to comment on what likely effect he will have on law-and-order issues?

Or do you feel that that is something you would prefer not to comment on?

Mr. OAKS. I think the endorsements that have been given to him by groups who are interested in law and order speak more loudly on that issue than I could.

Senator HATCH. I do not think they speak more loudly but they certainly speak with a great deal of force and vehemence.

Thank you very much. I am sorry to have taken so long but this is a particularly great panel, and I wanted to take some time and ask some of these questions.

[The following letter was subsequently supplied for the record:]

September 28, 1987

Honorable Orrin G. Hatch
United States Senate
SR-135, Russell Senate Office Building
Washington, DC 20510-4402

RE: Confirmation of Judge Robert Bork

Dear Senator Hatch:

This letter is to express support for the nomination of Judge Bork to the Supreme Court. As a female attorney of five years standing, I feel I represent a majority of young women attorneys who, contrary to many who have appeared before the Judiciary Committee, strongly support Judge Bork. I have made it a point to watch all the hearings to date, and applaud the actions of yourself and Senators Simpson, Grassley, Humphrey, and Thurmond in articulating the views of mainstream Americans.

The principle arguments used by opponents of Judge Bork center around his alleged lack of "open-mindedness", which in their estimation is causing great "fear" amongst individuals they define as "minorities," which includes all women and all poor and underprivileged, in addition to a myriad of other groups. They question whether he has the necessary sensitivity and compassion (the words of Senator Heflin) to meet their definition of judicial integrity and commitment to equal justice. They point to an arbitrary, nebulous standard of "balance" on the Court and proclaim that Judge Bork, while qualified, is the wrong person for this particular vacancy.

To apply a political litmus test for confirmation of our Supreme Court nominees is to set a dangerous precedent that American jurisprudence must not tolerate.

There has been an alarming trend by the courts to use judicial decisions to advance a political agenda deemed necessary for an "equal" society. To do this is to pre-empt legislative pre-eminence in policy making, and is a danger to the balance of power set out in the Constitution. The Supreme Court has looked first to the results it wished to achieve, and then used whatever "reasoning" was necessary to achieve these goals. In the process, they have made their authority superior to that of our elected legislators. While the end results may be laudible, it overlooks the fundamental ideal of representative government, in which change is evolutionary, well-debated in the public arena, and achieved through an orderly process of debate and compromise. I strongly agree with Senator Humphrey that Civil Rights changes were on the horizon of legislative action. Admittedly, the courts accomplished the civil rights movement in a shorter time frame; however, to say that they were the "champion" of civil rights that brought us out of the cave of apartheid is to clearly overstate the situation, and is an insult to the legislators and individual citizens who worked so assiduously toward civil rights for all. With or without the Supreme Court, this country was headed toward equality of the races. However, by creating quotas for school integration by mandating busing, by allowing quotas and special lowered standards for minority hiring in the workplace, and other similar decisions, the courts have in essence become legislators.

Another classic example of judicial legislation is Roe v. Wade. The decision that an unborn child in the first trimester has fewer constitutional rights that an unborn child in the second or third trimester - which is essentially the conclusion drawn when a woman has an unlimited right to an abortion in the first trimester, but must meet certain guidelines (doctor approval, etc.) in later trimesters - is legislation, pure and simple. This becomes particularly evident when one considers the medical advances that are daily changing the guidelines of "viability" (for those who accept the viability concept in the first place). Those on the Committee repeatedly point to Judge Bork's stated opposition to the privacy right found in Roe, as well as his American Cyanamide decision, as evidence that women "fear" (a noun greatly overused by many during the hearings) Judge Bork. If this is so, it is only because of deliberate attempts to mislead the public. Informed women do not fear Judge Bork.

There seems to be particular emphasis placed on whether Judge Bork includes women under the Equal Protection clause. The Committee seems to be missing the point (which you so eloquently made, Senator Hatch): the issue is which test of scrutiny is to be applied to groups other than racial or ethnic groups. As a woman, I do not feel threatened that Judge Bork would apply a reasonable standard rather than heightened or strict scrutiny, inasmuch as I consider myself neither a minority nor disadvantaged, and am thus entitled only to the standard of reasonableness applied to all individuals under the Equal Protection clause.

The Bill of Rights has become a supermarket list from which the justices pick and choose, isolating those which justify the ends they wish to achieve, without considering the Constitution as a cohesive document to be read in its entirety. Justices who find an absolute right to privacy in our Constitution are singling out a few words construed so literally as to lose their meaning within the complete context of the Constitution as a whole. The Bill of Rights was intended to provide core constitutional principles that are interdependent. Judge Bork and Justice Scalia have been in the forefront to return to the premise that every constitutional right must be read within the context of the entire document, thereby creating reasonable parameters to individual "rights".

What is evident is that our Constitutional framers intended for individuals to have the right to live in a community that reflected the values of the majority - morally and economically - through representative government. The Warren Era court has, by the consensus of only nine individuals, drastically altered that concept. We now only have a right to live in a community that tolerates the most liberal of moral standards, under the guise of the First Amendment. Parents who wish to supervise what their children read in school have to fight outside interest groups in court because freedom of expression has been expanded to include any form of expression, no matter how offensive it may be to the majority within a community.

Public morality, under recent Supreme Court decisions, has become no more or less than a card game of "52 pick-up", with the Supreme Court dealing out cards at will - abortions are private, sodomy is not. Privacy issues have come to resemble the myriad of confusing criminal law search and seizure exceptions that has hindered law enforcement efforts. (Incidentally, considering the time given to Professor Tribe and other singular individuals who have been allowed to run overtime, I thought the Committee's strict application of its time limitations to the police representatives who testified was rather shabby, particularly in view of the fact they had waited all day to make their presentation. Senator Biden gave the impression that judicial interpretation of criminal statutes is insignificant, a view which I rather doubt expresses the interests of the American public, who consider crime to be a major concern. While their prepared statements were made part of the record, the public was deprived of the opportunity to hear the full testimony of these experts, as well as to hear positive testimony illuminating Judge Bork's impeccable record in this area. The Warren Court did much to erode the effectiveness of our criminal justice system; surely those who speak of "balance" should be interested in testimony which favorably reflects upon a Judge who would restore "balance" to the criminal justice system.)

Judicial activism results in schizophrenic decisions that are "distinguished" ad infinitim. Congress has the power to change or modify legislation that doesn't meet the mark; the Supreme Court has to wait for another case to come before it. Clearly, judicial legislation - public policy making by a wink, in Judge Bork's words - must be curtailed.

It is interesting to note that "balance" was never an issue when President Roosevelt filled 8 of 9 Supreme Court vacancies. Balance is something that, if judged, must be viewed over a time frame of more than a decade or more. Inevitably, the "balance" of the Court will ebb and flow from conservative to liberal. Our system of presidential selection specifically balances this out. Senate Democrat protestations of Judge Bork's lack of "balance" seem hollow when viewed in the context of the Committee's actual make-up: no females, blacks, Hispanics, underprivileged, etc. etc. etc. For these Senators to appoint themselves the arbiters of "balance" is hypocritical and absurd.

The American public has expressed its desires regarding the court; President Reagan received a clear mandate twice from the American public regarding the future course they wish to see charted for this country. It is an established fact more people vote in presidential elections than other elections. The selection of Supreme Court justices was an election issue in both '80 and '84 that was thoroughly explored by the media, and as such, the people who elected President Reagan clearly understood the values he would apply in judicial selections.

Further, we elect Senators to articulate regional interests; our President serves our national interests. I do not think it practical to assume the public even remotely considered judicial nominees as a basis for choosing their Senator. Rather, most assumed (as I have) that a nominee will be confirmed provided s/he meets basic minimum requirements of integrity and intellectual capability, and lacks any specific, identifiable conflict of interest. Advise and consent, in my reading of the Constitution, was never intended to allow judicial nominations to become an ideological, political battlefield. To say these proceedings will have a chilling effect on individuals who are interested in serving within the judiciary is to seriously understate the consequences of the politicization that has engulfed the advise and consent process.

As a dues paying member of the American Bar Association, I resent the fact the ABA has interjected political discourse into their review of this candidate. It is the function of the ABA to determine only whether a candidate is qualified, as set out in the above paragraph. To include political ideology and qualities such as "balance" clearly exceeds their function.

I am licensed to practice law in Wisconsin and Florida, and the bulk of my practice is family law. I am also an Adjunct Professor. I have done considerable pro bono work for women who are often victimized by our present family legislation mandating community property, limited alimony, and joint custody. A discussion of the current problems in family law would be too lengthly for me to explore in this letter. Suffice it to say that despite the inequities I see in many areas of the law regarding women, I am nonetheless committed to two principles: 1) judicial "legislation" is not the solution to our current legal problems, and 2) as a woman who represents women, I do not in any way "fear" a conservative nominee such as Judge Bork. Judicial activism, with its concepts of sterile equality for all individuals, has in fact created many of today's problems in the family law area. Milton Friedman has said it best: the Constitution ensured equality of opportunity [through representative legislation], not equality of result.

I apologize for the length of this letter. However, in view of the broad general attacks that have been made during the Committee hearings against Judge Bork, it is impossible to present a cohesive argument regarding confirmation without going into some detail. Had his opponents confined themselves to Judge Bork's qualifications and intellectual capabilities, this letter would probably be unnecessary.

Please feel free to use this letter in whatever manner you deem appropriate to further the confirmation of Judge Robert Bork, clearly one of the most qualified nominees ever presented to the Senate for confirmation.

Kindest regards,

Edith-Marie Dolan, Esq

(Miss) Edith-Marie Dolan
Attorney-at-Law

2221 N.E. 41st Street
Lighthouse Point, FL 33064-7347
(305) 946-0892 / 429-0010

EMD:ga

cc: Honorable Charles E. Grassley
Honorable Gordon J. Humphrey
Honorable Alan K. Simpson
Honorable Arlen Specter
Honorable Strom Thurmond

Senator **DeConcini**. Senator Humphrey.

Senator **Humphrey**. Thank you, Mr. Chairman.

What you said, Mr. Bator, about the imposition of this new orthodoxy, sounds to me like the latest chapter in the popular book—sounds to me like the subject of a new chapter in the popular book, "The Closing of the American Mind."

I really have been astounded at the extraordinary polarization on this issue, and that is why I am so grateful to Professor Monaghan and others who are certified persons of the liberal establishment—if I may say that in a respectful way—that you would come forward—and you must be the subject of considerable criticism among your friends for doing this.

What in the world is going on out there? I have never seen anything like this in connection with any appointment in nine years, since I have been in the Senate.

Professor Monaghan, can you give us insights into what is happening? You come from the liberal community, I think it is fair to say. What in the world is going on?

Mr. **Monaghan**. It is well beyond my expertise. There has always been, in American politics, a large role for the irrational, and it is quite clear that Judge Bork is able to serve as a lightning rod—you know—I think partly because he wears a beard, and he looks——

[Laughter.]

Mr. **Monaghan**. He is not like Judge Scalia.

Senator **Humphrey**. That should make him more acceptable in academia.

Mr. **Monaghan**. No. I think that—you know, I think it is Judge Scalia whose views are far more conservative than Judge Bork. If Judge Scalia came in here today, there would be less intensity, and I also think that there are, in every period, symbolic battles, and it is time for a symbolic battle at this point, and of course, if it turns out that Judge Bork is not confirmed, the substance will not change. The next appointment will be, I think, a moderate conservative.

Senator **Humphrey**. Well, you said that—you used the word "irrational." How do you feel about these—do you regard most of these attacks, most of these criticisms as irrational, or the response of the liberal community as irrational?

Mr. **Monaghan**. No. I think that there are—I think there is a larger rational element in it. I think there are legitimate questions about how you compose the Supreme Court. This has been a useful dialogue about what goes into the composition of the Supreme Court. I do think that there is a danger that we will wind up, instead of having this committee act in a quasi-judicial capacity, as simply registering the strengths of various political groups.

This has all the hallmarks of an election to an outsider.

Senator **Humphrey**. Yes.

Mr. **Monaghan**. And I am sure that it is also true that the administration is pushing very hard, so it is not just——

Senator **Humphrey**. Not hard enough in my opinion.

Mr. **Monaghan**. Well, maybe not, but I am sure that they are pushing it, and you wonder whether or not—to be frank about it—how much of what we are doing now is simply theater.

Senator HUMPHREY. I have wondered that, too, as we have sat here hour after hour.

Mr. MONAGHAN. Well, it is very disturbing, if that is the case. I do think it is fair to say that the function of this committee, at least as it is outlined in the text of the Constitution and in the Federalist Papers is not to take over the President's judgment on this issue, it is to play the role of a checking function. Judge Bork's ideology is relevant. If the committee thinks that Judge Bork is outside the mainstream, it ought to reject him. I think everybody is agreed on that, or should be agreed on that framework.

Senator HUMPHREY. Yes. Well, I would just close with this observation. That if you look at the weight and the expenditures of money by various special interest groups, they are almost all in opposition to the nomination. And, if Judge Bork is denied confirmation on that basis, then I think I will offer legislation—I suppose it would take a constitutional amendment, but in any case, I think we would be well advised to change the name of the institution from the Supreme Court to the Court of Special Interests.

I yield back whatever time I have.

The CHAIRMAN. Senator Thurmond.

Senator THURMOND. Thank you very much.

I want to express my appreciation to you fine people for coming here today and testifying. I know some of you had to sacrifice to do that.

Now you have heard all throughout these hearings all kinds of questions and issues and going into detail and taking a lot of time. I am not going to take any time. I want to ask you one question, because it all boils down to this.

What is your conclusion about this man Judge Bork? Is he qualified to sit on the Supreme Court? Does he have the temperament, and does he have the integrity, and does he have the competency to be on there? Does he have the courage and the dedication to make a good Supreme Court Justice?

I am going to call each one of your names, and if you will either answer yes or no I will appreciate it.

Professor Bator.

Mr. BATOR. Yes, sir.

Senator THURMOND. Professor Monaghan.

Mr. MONAGHAN. Yes, sir.

Senator THURMOND. Professor BeVier.

Ms. BEVIER. Yes, sir.

Senator THURMOND. Professor Levin.

Mr. LEVIN. Yes, Senator.

Senator THURMOND. Professor Oaks.

Mr. OAKS. Yes, sir.

Senator THURMOND. Thank you very much. That is all I want to know, and that is all the American people want to know.

Senator DECONCINI. Mr. Chairman.

The CHAIRMAN. The Senator from Arizona.

Senator DECONCINI. Would the Senator yield for a question to Mr. Monaghan?

I just want to be sure in answering Senator Humphrey's questions—question, or at least his statement there, do you see, in observing the process we have gone through here—and this is for my benefit—do you see anything that we have done as a committee that is improper either in questioning, or the witnesses or in the conduct of the committee on either side by anybody, and certainly including myself?

I am asking that from the standpoint that, you know, if Judge Bork is confirmed, it seems to me this has been a very useful process and one that is legitimate. If he is not confirmed, I feel the same way, notwithstanding some very strong feelings about one interest group versus another, as far as this committee.

Would you care to comment?

Mr. MONAGHAN. Absolutely not. I have not heard from any side a single criticism of the manner in which this hearing has been conducted. I think that everybody understands that every effort has been made to conduct it fairly.

There is a question—the question doesn't go to the manner in which the committee has operated. The question goes to the process as it is set up. One of the question is whether or not in the end this is going to prove to be a simply atypical situation in which people who, by and large, want to make their wishes known, but, by and large, operate as interest groups. I mean, the structure of a great many panels that came before this committee is, I like this decision, Judge Bork doesn't like this decision, Judge Bork should not be confirmed. I think that testimony is irrelevant myself.

Senator DECONCINI. Well, you say it is irrelevant. Should we not have heard it?

Mr. MONAGHAN. No. You must hear it. You must hear it, I agree with that. And then one wonders about the process. I think it is going to take some time to know what to make of this, but in terms of the conduct of the Senators who conducted the committee, I would——

Senator DECONCINI. Because I just was kind of——

Mr. MONAGHAN. Yes. It just looks like it is almost out of control. That is all.

Senator DECONCINI. Well, from the academic point of view and blending that in with our political process, it seems to me like if Judge Bork is approved by this committee and confirmed by the Senate, people who support him and always have, they are going to say, hey, the process is okay. It came out okay.

Mr. MONAGHAN. I don't think that is true.

Senator DECONCINI. You don't think so.

Mr. MONAGHAN. Well, I am not sure——

Senator DECONCINI. And, if he is disapproved, those who oppose him—because the Senator from New Hampshire says that all the moneys being spent by those who oppose him. I don't know. The mail I am getting is almost equally divided, and it is an organized effort, indeed by special interests from both proponents and opponents. I have never seen anything like it I guess since I have been here.

And you can tell it has cost some money to print the cards and letters and to make the effort and to make the phone calls and to put it on the 700 Club and to put it on the NAACP writing list, and Common Cause, or whoever it is. It is just a real effort to bring this message of what they feel is there, and, of course, that is the process: I don't object to it as long as it is within bounds of not being obnoxious.

Mr. **MONAGHAN**. Well, maybe the way to conclude is to say this. This is an unsettling experience and one may say, probably, of this process what Churchill said of democracy—"It is the worst form of government except for every other one." I don't know.

Senator **DECONCINI**. Yes. Thank you. Thank you, Mr. Chairman.

The **CHAIRMAN**. It is the only one we have. Thanks for coming.

While we are bringing the next panel up, the committee has received today telegrams from two professors that relate to one of the essays submitted to us by former Secretary Carla Hills. Both professors object to the description of their views in the essay written by Professor Mary Ann Glendon.

The first telegram is from Professor Lucinda Finley, of Yale Law School, and her telegram reads as follows:

> I would like to respond to the gross mischaracterization and oversimplification of my views on sex equality contained in the written remarks of Professor Mary Ann Glendon delivered to the Senate Judiciary Committee by Carla Hills.
>
> It is I, and not Judge Bork, who in my writings has argued for a nuanced and differentiated approach to equality. I have written that our concept of legal equality must be enhanced to include the needs and experiences of women, rather than the predominantly male standard that has traditionally been applied in his judicial opinions on sexual harassment in the *American Cyanamid* case.
>
> Judge Bork has displayed startling insensitivity to the needs and realities facing working women. Far from advocating the nuanced approach to equality that would protect women, Judge Bork has continually questioned whether women should even be protected by the equal protection clause of the Constitution. In this regard he would be far worse for women than any recent members of the Supreme Court.
>
> While I do not always agree with the approach of all Justices, the Court has developed a consensus in favor of sex equality that Judge Bork does not support and has frequently criticized. I strongly oppose his nomination.
>
> Thank you for considering my views and allowing the opportunity to correct the record.
>
> Sincerely, Lucinda M. Finley, Associate Professor of Law at Yale.

And the second one is from Carol Gilligan, Professor, Harvard University Graduate School of Education.

> Carla Hills in her testimony to your Committee cited a paper by Professor Mary Ann Glendon. Professor Glendon's paper erroneously implies that I would support the nomination of Judge Robert Bork and states that his judicial philosophy exemplifies what I have called a different voice.
>
> In fact, Judge Bork represents precisely the kind of rigid, dogmatic, abstract and impersonal judicial philosophy that calls for a different voice. His opinions and writings rule out of court many voices which the American judicial system must be responsive to if protections afforded by the Constitution are to be extended to all citizens.
>
> I strongly urge a vote against his confirmation.
>
> Carol Gilligan, Professor, Harvard University Graduate School of Education.

[Telegrams follow:]

L M FINLEY
227 HIGHLAND ST
NEW HAVEN CT 06511 24AM

Western Union Mailgram

4-0321348267 09/24/87 ICS IPMMTZZ CSR WHSB
2034324929 MGMS TDMT NEW HAVEN CT 237 09-24 0428P EST

SENATOR JOSEPH BIDEN
CAPITOL ONE DC 20510

I WOULD LIKE TO RESPOND TO THE GROWTH MISCHARACTERIZATION AND OVER SIMPLIFICATION OF MY VIEWS ON SEX EQUALITY CONTAINED IN THE WRITTEN REMARKS OF PROFESSOR MARY ANN GLENDON DELIVERED TO THE SENATE JUDICIARY COMMITTEE BY CARLA HILLS. IT IS I, AND NOT JUDGE BORK, WHO IN MY WRITINGS HAS ARGUED FOR A "NUANCED AND DIFFERENTIATED APPROACH TO EQUALITY." I HAVE WRITTEN THAT OUR CONCEPT OF LEGAL EQUALITY MUST BE ENRICHED TO INCLUDE THE NEEDS AND EXPERIENCES OF WOMEN, RATHER THAN THE PREDOMINANTLY MALE STANDARD THAT HAS TRADITIONALLY BEEN APPLIED. IN HIS JUDICIAL OPINIONS ON SEXUAL HARASSMENT AND IN THE AMERICAN CYANAMID CASE, JUDGE BORK HAS DISPLAYED STARTLING INSENSITIVITY TO THE NEEDS AND REALITIES FACING WORKING WOMEN. FAR FROM ADVOCATING A "NUANCED" APPROACH TO EQUALITY THAT WOULD PROTECT WOMEN, JUDGE BORK HAS CONTINUALLY QUESTIONED WHETHER WOMEN SHOULD EVEN BE PROTECTED BY THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION. IN THIS REGARD, HE WOULD BE FAR WORSE FOR WOMEN THAN ANY RECENT MEMBERS OF THE SUPREME COURT. WHILE I DO NOT ALWAYS AGREE WITH THE APPROACH OF ALL JUSTICES, THE COURT HAS DEVELOPED A CONSENSUS IN FAVOR OF SEX EQUALITY THAT JUDGE BORK DOES NOT SUPPORT AND HAS FREQUENTLY CRITICIZED. I STRONGLY OPPOSE HIS NOMINATION. THANK YOU FOR CONSIDERING MY VIEWS AND ALLOWING ME THIS OPPORTUNITY TO CORRECT THE RECORD.

SINCERELY YOURS,
LUCINDA M FINLEY
ASSOCIATE PROFESSOR OF LAW
YALE LAW SCHOOL
227 HIGHLAND ST
NEW HAVEN CT 06511

16:26 EST

MGMCOMP

TO REPLY BY MAILGRAM MESSAGE, SEE REVERSE SIDE FOR WESTERN UNION'S TOLL - FREE PHONE NUMBERS

4-0031855270 09/27/87 ICS IPMMTZZ CSP POMH
6176452873 TDMT GAY HEAD MA 108 09-27
1043A EST 10:40 EST

western union Telegram

SENATOR JOSEPH BIDEN
WASHINGTON DC 20510

CARLA HILLS IN HER TESTIMONY TO YOUR COMMITTEE CITED A PAPER BY PROFESSOR MARY ANN GLENDON, PROFESSOR GLENDON'S PAPER ERRONEOUSLY IMPLIES THAT I WOULD SUPPORT THE NOMINATION OF JUDGE ROBERT BORK AND STATES THAT HIS JUDICIAL PHILOSOPHY EXEMPLIFIES WHAT I HAVE CALLED A "DIFFERENT VOICE." IN FACT, JUDGE BORK REPRESENTS PRECISELY THE KIND OF RIGID, DOGMATIC, ABSTRACT AND IMPERSONAL JUDICIAL PHILOSOPHY THAT CALLS FOR A DIFFERENT VOICE, HIS OPINIONS AND WRITINGS RULE OUT OF COURT MANY VOICES WHICH THE AMERICAN JUDICIAL SYSTEM MUST BE RESPONSIVE TO IF THE PROTECTIONS AFFORDED BY THE CONSTITUTION ARE TO BE EXTENDED TO ALL CITIZENS, I STRONGLY URGE YOU TO VOTE AGAINST HIS CONFIRMATION,

CAROL GILLIGAN, PROFESSOR
HARVARD UNIVERSITY GRADUATE SCHOOL OF EDUCATION

10:40 EST

IPMPOMX WSH

Two practicing lawyers make up our next panel. Howard Klein is a partner in the Chicago law firm of Kirkland & Ellis, and Read Carlock is a partner in the Phoenix law firm of Ryley, Carlock & Applewhite.

Would those gentlemen please come forward? I welcome them to the committee. And, if they will be sworn.

Would you gentlemen take the oath? Do you swear the testimony you are about to give is the whole truth and nothing but the truth, so help you God?

Mr. **Krane**. I do.

Mr. **Carlock**. I do.

The **Chairman**. Thank you. Welcome, gentlemen. As you have observed, by being so patient all day, we are trying to adhere to a 5-minute rule. If we could start with you, Mr. Krane.

Did I say Klein? I meant to say Krane. I'm sorry if I said that.

Mr. **Krane**. That is quite all right, Senator.

The **Chairman**. Mr. Krane, I am correct you are a partner in Kirkland & Ellis?

Mr. **Krane**. Yes, sir.

The **Chairman**. Please proceed.

TESTIMONY OF A PANEL CONSISTING OF HOWARD KRANE AND READ CARLOCK

Mr. KRANE. Thank you. I am grateful for this opportunity to testify in support of Judge Robert Bork's nomination as an Associate Justice of the Supreme Court. As you have said, I am a senior partner in the law firm of Kirkland & Ellis, in its Chicago office. I am a member of the American Bar Association and the American Law Institute. I have written extensively in the field of taxation and have taught business planning for over 15 years at the University of Chicago Law School. I have served on occasion as an unpaid consultant to the Treasury and to the Senate Finance Committee on tax matters.

Others have testified to Judge Bork's qualifications as a constitutional law scholar and his record as a distinguished and principled jurist. My focus will be on Bob Bork the person. I hope my testimony will be helpful to this committee because I understand that some committee members who have not known Bob Bork over the years have wondered what sort of person he is.

By way of background and as an historical footnote, I am the lawyer who as a young man was the immediate beneficiary of Bob Bork's insistence to the senior partners of my law firm that it eliminate prejudice and discrimination from its hiring practice in 1957, a time, regrettably, when quotas and other discriminatory practices were not uncommon within the legal profession and most other parts of American society and business.

During my work with him at my firm over 4 years our personal friendship began and grew. After he left to teach at Yale, our association continued. I was close enough to Bob to share his grief and sorrow during Claire's long illness and tragic death. I was close enough to Bob to have had the honor of serving as best man at his marriage to Mary Ellen.

From these 30 years of close acquaintance and friendship, I believe I can supply answers to any questions you may have about Judge Bork as a person. So that there is no mistake about my own politics and viewpoints, I readily acknowledge that I am and have been considered a liberal Democrat. I have voted for every Democratic Presidential nominee beginning with Adlai Stevenson.

The negative symbolism and rhetoric that has clouded real insight into Judge Bork's views during this confirmation process bear no resemblance to the man and his true character. Bob Bork is a person without prejudice against any group. In all the many personal and private conversations I have had with him over the years, I have never heard him disparage anyone based on race, gender, religion or ethnicity. There can be and is no basis for any suggestion that Bob Bork's personal views and beliefs make him unsympathetic to victims of official or private discrimination or predisposed against their plight. If there were, we would not be friends, and I would not have had the opportunity he opened up for me and others at my firm.

Second, Bob Bork is a person who has devoted his professional life and much of his personal life to thoughtful analysis and intellectual inquiry. His intellectual life reflects the highest standard of integrity, one which is totally at war with the charges of prejudgment and intransigence.

A major part of our time over the years has been expended in spirited discussion about matters, large and small, of philosophy, public policy and the law. What I know from these discussions is that Bob Bork is not one who argues for sport or who insists that his initial position prevail. He grapples with ideas, including opposing viewpoints, to better understand the issues, to examine the premises of competing positions, and to reach reasoned and principled conclusions.

As should any person of real integrity, he is willing to modify and to change his views when persuaded by the merits of others' arguments.

I think one reason that Bob Bork is misperceived by his critics is that he is engaged in the challenge of intellectual life with robust rhetoric, enormous vigor, and effective wit. No one who knows him is fooled by the intensity of his debate to believe that his is not a searching and open mind.

I am not nearly as well qualified as others whom you have heard attest to Judge Bork's credentials as a scholar and a judge, but to be certain, I know Bob Bork the person. I have seen his commitment to equal rights in a very personal way. I have seen him pass up the opportunity for a lucrative private practice so that he could serve the legal profession and his country through teaching and governmental service.

I have, in short, the measure of the man. With the authority of personal knowledge, I can and do reject any suggestion that Bob Bork has misstated his views or falsely professed to have changed his views in order to enhance his chances of being approved by this committee and confirmed by the Senate.

His integrity, to say nothing of his respect for the law and the constitutional preserve of the U.S. Senate, would not permit him to speak during these hearings with less than complete candor. He has devoted his professional life to honest intellectual inquiry and discourse. That is at the core of who Bob Bork is. He would not abandon that which he holds most dear in order to attain any office or honor including that of being a Supreme Court Justice.

As I indicated at the outset of my remarks, I am grateful for the opportunity to testify on behalf of Bob Bork. But I am also saddened that testimony such as mine is in any way necessary. I am a believer that reasonable men and women can disagree about a great many things, but reasonable men and women cannot disagree about the integrity, honesty and candor of Bob Bork. In these respects, as well as many others, he is the finest man I know.

Thank you.

[Prepared statement follows:]

Howard G. Krane

Testimony before Senate Judiciary Committee

on the Proposed Confirmation of Judge Robert H. Bork

I am grateful for this opportunity to testify in support of Judge Robert Bork's nomination as an Associate Justice of the Supreme Court.1/ Others have testified to Judge Bork's qualifications as a constitutional law scholar and his record as a distinguished and principled jurist. My focus will be on Bob Bork, the person. I hope my testimony will be helpful to this Committee because I understand that some Committee members who have not known Bob Bork over the years have wondered what sort of a person he is.

To that question, I think I am well qualified to speak and to assure the Committee that Bob Bork is a man free from prejudice toward any group, who has exemplified the values of equality and fairness throughout his life.

By way of background and as an historical footnote, I am the lawyer who as a young man was the immediate beneficiary of Bob Bork's insistence to the senior partners of my law firm that it eliminate prejudice and discrimination from its hiring practice in 1957, a time regrettably when quotas and other discriminatory practices were not uncommon within the legal profession and most other parts of American society and business. During my work with him at my firm over four years, our personal friendship began and grew. After he left to teach at Yale, our association continued. I was close enough to Bob Bork to share his grief and sorrow during Claire's long illness and tragic death. I was close enough to Bob to have had the honor of serving as best man at his marriage to Mary Ellen.

From these thirty years of close acquaintance and

1/ I am a senior partner in the firm of Kirkland & Ellis in its Chicago office. I am a member of the American Bar Association and the American Law Institute, I have written extensively in the field of taxation and have taught business planning for over 15 years at the University of Chicago Law School. I have served on occasion as an unpaid consultant to the Treasury and to the Senate Finance Committee on tax matters.

friendship. I believe I can supply answers to any questions you may have about Judge Bork as a person. So that there is no mistake about my own politics and viewpoints, I readily acknowledge that I am and have been considered a liberal Democrat; I have voted for every Democratic presidential nominee beginning with Adlai Stevenson.

The negative symbolism and rhetoric that has clouded real insight into Judge Bork's views during this confirmation process bear no resemblance to the man and his true character. Bob Bork is a person without prejudice against any group. He has demonstrated, in my situation and throughout his life, his commitment on principle to individual equality and fairness. In all the many personal and private conversations I have had with him over the years, I have never heard him disparage anyone based on race, gender, religion, or ethnicity. There can be, and is, no basis for any suggestion that Bob Bork's personal views and beliefs make him unsympathetic to victims of official or private discrimination or predisposed against their plight. If there were, we would not be friends and I would not have had the opportunity he opened up for me and others at my firm.

Second, Bob Bork is a person who has devoted his professional life and much of his personal life to thoughtful analysis and intellectual inquiry. His intellectual life reflects the highest standard of integrity, one which is totally at war with the charges of prejudgment and intransigence. A major part of our time over the years has been expended in spirited discussion about matters, large and small, of philosophy, public policy, and the law. What I have observed and know from these discussions, is that Bob Bork is a person who does not argue for sport or who insists that his initial position prevail. He grapples with ideas -- including opposing viewpoints -- to better understand the issues, to examine the premises of competing positions, and to reach reasoned and principled conclusions. As should any person of real integrity, he is willing to modify and to change his views when persuaded by the merits of others' arguments. It is the essence of intellectual integrity for a person to challenge the logic and basis of positions, including his own, and to modify his views when persuaded by reason and evidence.

I think one reason that Bob Bork is misperceived by his critics is that he has engaged in the challenge of intellectual life with robust rhetoric, enormous vigor, and effective wit. No one who knows him is fooled by the intensity of his debate to believe that his is not a searching and open mind.

Finally, I can attest that Bob Bork has the integrity and ability to separate his own philosophic quests from the discipline of evaluating and deciding cases as a judge and as a Justice. While challenging the premises of a legal doctrine as an individual contributing to public debate, he has proven as a judge that he does not repudiate the rule of law or the role of precedent and that he does respect the functions of the legislative and executive, as well as the judiciary.

I am not nearly as well qualified as others whom you have heard attest to Judge Bork's credentials as a scholar and a judge. To have served with distinction as a tenured professor at one of the nation's foremost law schools, as the principal constitutional lawyer for the government as Solicitor General, and as a respected jurist on the United States Court of Appeals, it seems obvious to me that his professional qualifications are excellent and beyond real dispute.

But, to be certain, I know Bob Bork as an individual. I have seen his commitment to equal rights in a very personal way. I have seen him pass up the opportunity for a lucrative private law practice so that he could serve the legal profession and his country through teaching and governmental service.

I have, in short, the measure of the man. With the authority of personal knowledge, I can and do reject any suggestion that Bob Bork has misstated his views, or falsely professed to have changed his views, in order to enhance his chances of being approved by this Committee and confirmed by the Senate.

Such suggestions are outrageous. His integrity -- to say nothing of his respect for the law and the constitutional preserve of the United States Senate -- would not permit him to speak during these hearings with less than complete candor. He has devoted his professional life to honest intellectual inquiry and discourse. That is at the core of who Bob Bork is. He would not abandon that which he holds most dear in order to attain any office or honor -- including that of being a Supreme Court Justice.

As I indicated at the outset of my remarks, I am grateful for the opportunity to testify on behalf of Bob Bork. But I am also saddened that testimony such as mine is in any way necessary. I am a believer that reasonable men and women can disagree about a great many things. But reasonable men and women cannot disagree about the integrity, honesty and candor of Bob Bork. In these respects, as well as many others, he is the finest man I know.

The CHAIRMAN. He is very lucky to have a friend like you. Seriously. Thank you for your testimony and for coming.

Mr. Carlock.

TESTIMONY OF GEORGE READ CARLOCK

Mr. CARLOCK. My name is George Read Carlock. I have practiced law in Phoenix, AZ, for just a few months short of 40 years.

I speak here today from the perspective of a practicing lawyer who understands the vital importance to our country that its judges be of the highest caliber and ability. Practicing lawyers probably pay more attention to how the judges at all levels do their jobs than do any other group of people, and we are simultaneously very respectful and very critical of them.

There are some qualities of character, intellect and personality which are essential to judges at all levels. A judge must have integrity and he must be professionally competent. Without these qualities, he would have no business being a judge at all. With these qualities, he still needs another—a judicial temperament. Volumes can be and have been written on just what a judicial temperament is.

To most lawyers, it means understanding the facts and considering and understanding the arguments before reaching a decision, and basing the decision on the facts and the relevant legal principles, rather than using a primarily result-oriented approach.

As you have heard from most of the witnesses in these proceedings, there is no question but that Judge Bork has these three qualities. An example is the testimony of former Transportation Secretary Coleman, who, as a member of the American Bar Association's Committee on Judicial Qualifications, studied Judge Bork's judicial qualifications before his appointment to the court of appeals. Secretary Coleman has testified before this committee as to those qualities that he "could not fault Bork in any of the three."

It is perfectly true, of course, that different courts have different tasks to perform, and thus, that particular attributes may be important in varying degrees on different courts. In a trial court judge, for example, an ability to grasp the facts quickly and a ready command of the everyday questions about rules of procedure and of evidence are especially valuable attributes. The ability to decide quickly and accurately is of the greatest importance.

Most often the judge's task is to conduct an orderly and fair trial to determine facts, to analyze the legal and factual arguments presented, and then to determine the outcome of the case by applying to the facts the relevant principles of law. This is a huge responsibility. On its proper discharge depends the proper functioning of our daily lives and our relations with each other and with our government. The element of predictability which is inherent in the careful and conscientious discharge of this responsibility justifies our proud boast that we have a government not of men but of laws.

The Justices of the U.S. Supreme Court have a somewhat different task. As to the facts, their task may be narrower because they look to findings of fact rather than to a welter of testimony and documentary evidence. But as to determining the legal principles which will govern the case, their task is much wider. By the very nature of our judicial process, the questions they consider are the most difficult ones. They include the questions which have been answered differently by different courts of appeal, questions posed by disputes between two or more of our co-equal State governments, and the most fundamental questions concerning the rights and duties of the citizenry amongst themselves and in relation to their government, and the scope of the authorities and responsibilities of that government.

Justices must have the ability and the willingness to understand the questions of legal philosophy inherent in construing and applying in a principled and systematic way a Constitution which was designed not as an exercise in abstract thought and not as a detailed prescription of how our Government is to operate or how we must act towards one another, but as a framework of basic principles and values which would preclude deciding everything on a case-by-case basis, and which could rest on the concept of responsible government with the consent of the governed.

Only if conforming to such a framework can our laws have the moral force which is necessary for them to be respected. The Justices must assure themselves and the country of the consistency of application of principles of constitutional concepts and the legislative and administrative measures those concepts govern, at the same time recognizing the force of new ideas and of new arguments and of evolution in the situations to which the basic principles are to be applied.

Each Justice must therefore respect precedent but must be willing to engage in a constant re-examination of prior decisions and subscribe to changes in appropriate situations. Neither a slavish and uninformed adherence to prior decisions nor a purely case-by-case result-oriented approach will do the job.

Judge Bork has to a remarkable degree the qualities of intellect and character necessary to this task. His insistence on determining how and where an idea fits into the framework of our Constitution gives a principled continuity to his thinking and hence his judicial determinations and opinions.

His lively intellectual curiosity gives assurance that new facts and new arguments will be considered and old results changed, if appropriate. When is it appropriate to change old results?

I believe Judge Bork's answer to that question, in practice, will be that he will not seek to change old results just because in his view there was a better answer when the result was first reached if in the meantime governmental and private arrangements and expectations have made the old results so much a part of our structure that it is better left alone.

He will also, I believe, be perfectly willing to examine new facets of any matter and listen intelligently and receptively to new arguments. In doing all this he will adhere scrupulously to the principle that the legislative and judicial branches are separate and co-equal and will not set himself up as a super legislator.

As a footnote to all that, and a very important one to practicing lawyers, he has the understanding of our legal system and the mental discipline to state his opinions in such a way that lower courts and lawyers can know with some precision how to deal with concrete and detailed cases.

Although the element of predictability is not the same with the Supreme Court as it is with the lower courts, nevertheless, the Supreme Court has a great responsibility in this regard, and its means of discharging this responsibility is by giving clear guidance which can be broadly and effectively applied.

The CHAIRMAN. Mr. Carlock, if you could summarize, I would appreciate it. You are twice over your time. If you could.

Mr. CARLOCK. In this I believe Judge Bork will excel. Thank you, Mr. Chairman.

[Prepared statement follows:]

STATEMENT OF
GEORGE READ CARLOCK
BEFORE THE SENATE JUDICIARY COMMITTEE
SEPTEMBER 18, 1987

My name is George Read Carlock. I live in Phoenix, Arizona, and have been engaged in the general practice of law in Phoenix for just short of forty years.

I am a member of the State Bar of Arizona, the Maricopa County Bar Association, the American Bar Association, and the American Judicature Society. I am a Fellow of the American College of Probate Counsel and a Fellow of the American Bar Foundation. I have been Chairman of the Antitrust Law Section and of the Corporation, Banking and Business Law Committee of the State Bar of Arizona; and was for ten years a member, and for two years chairman, of the Supreme Court's Committee on Examinations and Admissions. For more than twenty years I was a lawyer representative to the Ninth Circuit Judicial Conference.

I appear here today not as a representative of any organization. I speak from the perspective not of an advocate for any particular cause or ideological viewpoint, but from the perspective of a practicing lawyer who understands that it is vitally important to our country that its judges be of the highest caliber and ability.

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It is perfectly true, of course, that different courts have different tasks to perform, and thus that particular attributes may be important in varying degrees on different courts. In a trial court judge, for example, an ability to grasp the facts quickly and a ready command of the every-day questions about rules of procedure and of evidence are especially valuable attributes. The ability to decide quickly and accurately is of the greatest importance. Most often the judge's task is to conduct an orderly and fair trial, to determine the facts, to analyze the legal and factual arguments presented, and then to determine the outcome of the case by applying to the facts the relevant principles of law. This is a huge responsibility. On its proper discharge depends the proper functioning of our daily lives, and our relations with each other and with our government. The element of predictability which is inherent in the careful and conscientious discharge of this responsibility justifies our proud boast that we have a government not of men but of laws.

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But as to determining the legal principles which will govern the case, their task is much wider. By the very nature of our judicial process, the questions they consider are the most difficult ones. They include the questions which have been answered differently by different courts of appeals, questions posed by disputes between two or more of our co-equal state governments, and the most fundamental questions concerning the rights and duties of the citizenry amongst themselves and in relation to their government, and the scope of the authorities and responsibilities of that government.

The justices must have the ability and the willingness to understand the questions of legal philosophy inherent in construing and applying, in a principled and systematic way, a Constitution which was designed not as an exercise in abstract thought, and not as a detailed prescription of how our government is to operate or how we must act toward one another, but as a framework of basic principles and values which would preclude deciding everything on a case-by-case basis, and which could rest on the concept of responsible government with the consent of the governed. Only if conforming to such a framework can our laws have the moral force which is necessary for them to be respected.

The justices must assure themselves and the country of the consistency of application of principles of constitutional concepts and the legislative and administrative measures those concepts govern, at the same time recognizing the force of new ideas and of new arguments, and of evolution in the situations to which the basic principles are to be applied.

Each justice must therefore respect precedent, but must be willing to engage in a constant re-examination of prior decisions and subscribe to changes on appropriate situations. Neither a slavish and uninformed adherence to prior decisions nor a purely case-by-case, result-oriented approach, will do the job.

Judge Bork has, to a remarkable degree, the qualities of intellect and character necessary to this task. His insistence on determining how and where an idea fits into the framework of our constitution gives a principled continuity to his thinking and hence his judicial determinations and opinions. His lively intellectual curiosity gives assurance that new facts and new arguments will be considered and old results changed if appropriate.

When is it appropriate? I believe Judge Bork's answer to that question in practice will be that he will not seek to change old results just because in his view there was a better answer when the result was first reached, if in the meantime governmental and private arrangements and expectations have made the old result so much a part of our structure that it is better left alone. He will also, I believe, be perfectly willing to examine new facets of any matter, and listen intelligently and receptively to new arguments. In doing all this, he will adhere scrupulously to the principle that the legislative and judicial branches are separate and co-equal, and will not set himself up as a super legislator.

As a footnote to all that, and a very important one to practicing lawyers, he has the understanding of our legal system and the mental discipline to state his opinions in such a way that lower courts and lawyers can know with some precision how to deal with concrete and detailed cases. Although the element of predictability is not the same with the Supreme Court that it is with the lower courts, nevertheless, the Supreme Court has a great responsibility in this regard, and its means of discharging this responsibility is by giving clear guidance which can be broadly and effectively applied. In this I believe Judge Bork will excel.

The **CHAIRMAN**. That is what I call bringing it to an end. Thank you very, very much.

The Senator from South Carolina.

Senator **THURMOND**. I want to thank you gentlemen for coming and testifying. I would just ask you the same question I just asked the panel before.

You know Judge Bork. I want to ask you this. Is he in the mainstream or is way out, leftwing or rightwing?

Mr. **CARLOCK**. In my view, Senator Thurmond, he is in the mainstream.

Senator **THURMOND**. In the mainstream?

Mr. **CARLOCK**. Yes, sir.

Senator **THURMOND**. Well, that is what Chief Justice Burger says, so you and he are in accord on that.

Mr. **CARLOCK**. Well, I am in good company.

Senator **THURMOND**. Chief Justice Burger went so far as to say, if Judge Bork's an extremist, I am an extremist, showing that he has full faith that he is reasonable and within the mainstream.

How do you feel about that?

Mr. **KRANE**. I feel the same way.

Senator **THURMOND**. Same way.

Mr. **KRANE**. Yes.

Senator **THURMOND**. Now, I want to ask you this question. You heard the question I asked the previous panel here. Are you satisfied of his qualifications to be a Supreme Court Justice, and would you recommend that the Senate confirm him for the Supreme Court?

Mr. **CARLOCK**. I am so satisfied, Senator Thurmond, and I do so recommend.

Mr. **KRANE**. I am obviously so satisfied and do so recommend.

Senator **THURMOND**. I thought that would be your answer but I just wanted to get it on the record. Thank you very much.

The **CHAIRMAN**. Senator DeConcini.

Senator **DECONCINI**. Mr. Chairman, I don't have any questions. I do want to join the chairman in complimenting Mr. Krane. Obviously, you are a good friend. And quite frankly, it is important for me to know something personal about him, somebody who has worked with him and seen him in action.

And just for the record, Mr. Chairman, Mr. Carlock is senior member of one of the most prestigious law firms in the country, hailing from my State, and he is indeed an expert in antitrust. He has been around a long time with such notables as Ted Riggins and Evo DeConcini and others who have practiced a long time, so I am very pleased that the committee was able to take his testimony.

Thank you, Mr. Chairman.

The **CHAIRMAN**. Thank you.

Senator Humphrey.

Senator **HUMPHREY**. I thank the witnesses, Mr. Chairman, but I have no questions.

The **CHAIRMAN**. Gentlemen, you were kind to come. Your testimony is much appreciated. Thank you very much.

Mr. **CARLOCK**. Thank you, Mr. Chairman.

Mr. **KRANE**. Thank you, Mr. Chairman.

The **Chairman**. Our last witness for today, I had indicated incorrectly that he was not going to testify, is Kenneth Dean, pastor of the First Baptist Church in Rochester, NY.

Pastor Dean, would you come forward, please?

Reverend Dean, would you raise your right hand? Do you swear the testimony you are about to give is the whole truth and nothing but the truth, so help you God?

Reverend **Dean**. I do, sir.

The **Chairman**. Thank you very much.

If you could keep your remarks within 5 minutes, we would appreciate it. And any written testimony you have will be entered in the record as if read.

TESTIMONY OF REVEREND KENNETH DEAN

Reverend **Dean**. Mr. Chairman and distinguished members of the Senate, I thank you for the opportunity of coming before you today. I am Kenneth L. Dean, of 3873 Elmwood Avenue, Rochester, NY. A native of Maryville, TN.

I attended public schools in Maryville, TN. My undergraduate college work is in philosophy, from Carson-Newman College, a Southern Baptist school in Jefferson City, TN.

I attended Southeastern Seminary in Wake Forest, NC. My bachelor of divinity degree is from Colgate-Rochester Divinity School in Rochester, NY. I hold the T.H.M. degree in pastoral psychology and the doctorate of ministry from the same institution. All of my post-high school studies have been at Baptist institutions of higher learning.

From 1965 until 1970, I was the executive director of the Mississippi Council on Human Relations. This work had to do with race relations and civil rights. From 1970 to 1972, I was a graduate fellow and instructor in pastoral psychology at Colgate-Rochester.

Also in 1970, I organized Communications Improvement, Inc., a private nonprofit corporation in Jackson, Mississippi, under a landmark decision written by then Appellate Judge Warren Burger. This corporation became the licenseholder of WLBT Television, an NBC affiliate in Jackson.

I served as president of the corporation until 1976. As the operators of Mississippi's leading broadcast facility, it was our task to develop the nation's first biracial television facility for a deep South area. We were successful in this endeavor, and today Jackson, MS, has the nation's first black-owned major television station and a second station under the leadership of a black general manager.

In 1976, I became the pastor of Prescott Memorial Baptist Church in Memphis, TN. Since 1981 I have been the pastor of the First Baptist Church in Rochester, NY, a congregation where I served as student minister while doing my theological studies.

I was ordained in the Southern Baptist Convention, but now serve an American Baptist church. I am married and have four children. They attend public schools in Pittsford, NY. My wife is a family therapist.

Along with my work assignments in race relations and ministry, since 1967 I have had the continuing involvement in hunger and poverty studies. In 1968, when Senators Jacob Javits and Robert

Kennedy asked me to help document hunger in the Mississippi Delta, I initiated the hunger studies that eventually led to the hungry children report.

For the past 3 years, I have been a member of the physician task force on hunger out of the school of public health at Harvard University. In 1978, I organized the field work for Hunger Revisited, a 10-year review of federal food programs. This work was sponsored by the Field Foundation under the leadership of Dr. Leslie Dunbar.

While my work and studies have offered me a broad range of experiences, my heritage is that of a southerner of east Tennessee Republicanism and the Evangelical Church. In September of 1985, I was invited to be one of about 35 clergy from across the country for a week at the Brookings Institution here in Washington, DC.

The Brookings Conference for Leadership Clergy was on "How Government Makes Decisions." One of the featured speakers for that conference was Appellate Judge Mr. Robert Bork. Judge Bork's speech on "Religion and the Law," he had given a similar speech at the University of Chicago in November 1984, and I would like to say that some of the questions that have been asked here this afternoon about the character of an individual, about his philosophy, it would be good if you didn't feel too anxious and too sensitive about the issue of religion to look at those speeches, for they contain some answers to those questions which I have not heard forthcoming from other witnesses. They are terribly important speeches as regards the man's philosophy in terms of the operation of government.

In his Brookings' speech, Judge Bork handled issues which are helpful with insight into his position on a number of concerns of the American people. The Judge was introduced as a distinguished former professor of law at Yale University, as the Solicitor General who fired Archibald Cox, as an appellate judge, and as the probable next nominee to the Supreme Court.

He began his talk with a Johnny Carson-type monologue, the subject of which was his compulsive smoking. With a touch of humor, he mentioned the many warnings his doctor had given him on the dangers of his compulsion and his inability to do anything about it. There was both a touch of confession and humor as he told us that he really was saying that what he hoped we wouldn't mind was that he would continue smoking while he lectured.

Following this, he stated that he wanted us to know that his remarks on religion were his thoughts on the subject as it related to society, and that they were not interested—or they were not intended to suggest something he practiced in his personal life.

I would like to interject at this point that I do not, nor do I believe that any of the clergy people at the Brookings Institution, would hold a religious test up to Mr. Bork, but I describe his comments here because I think that they set the context for understanding some of his later statements.

After saying that his discussion had to do not with what he practiced in his personal life concerning religion, he went on to point out that he supposed that if a label had to be put on his views of religion, it would be that of the agnostic. He started to move then into the body of his speech, but he paused for a few seconds and stated that he thought he should correct his statement about being an agnostic. He said that he guessed it probably was not completely correct to label himself an agnostic. That he did believe in some form of religion, but that it was not something he could explain or describe. Anyway, he said that while he practiced no religion, still it would not be precisely correct to describe himself as an agnostic.

Judge Bork then gave his speech and was followed by a respondent, Dr. James Dunn, the executive director for the Joint Baptist Committee on Public Affairs. The Judge's address was filled with observations and conclusions that were in deep and wide disagreement with many of the clergy. Dr. Dunn's response was critical and vigorous. Following his remarks, the floor was open for discussion.

The questions were rapid and filled with emotion. Judge Bork's responses were in like manner. The main emphasis had to do with Bork's call for a new weighting between church and state. A posture at variance with the belief and practice of most of the clergy present. This heated debate eventually became an entanglement of emotions and technicalities.

At this point in the discussion, I attempted to return the focus to a more concrete issue, so I asked Bork to respond to an experience I had as a junior high school teacher at Edgewood Junior High School on Merritt Island in Florida in 1961. I taught there at that public school for one semester when I was transferring my theological studies from Southeastern Seminary to Colgate-Rochester Divinity School.

I described to Bork that it was the practice of the school where I taught to begin each day with what was called "home room devotions." Each student was expected to take a turn at reading the Bible, sometimes leading in The Lord's Prayer, and always in giving salute to the American flag. The student participation was based on alphabetical order of the last name.

One morning when I arrived at my desk a 13-year-old boy was waiting for me. He commented that it was his day to lead the devotions. He explained that he was Jewish and that his parents did not want him to lead in the devotions. He said that they did not wish for him to read the New Testament, as was the custom.

I told him that he could read the Old Testament. He replied that his parents did not want him to participate in the devotions at all. That they believed that religious instruction should be at home and in the synagogue.

The student and I had a friendly relationship, and I could tell that he was troubled by a possible split in authority between his parents and myself. He then asked if he had to do the reading.

Aware that the young boy was caught between the authority of school and teacher on the one hand and parents and home on the other, I told him that he did not have to do the reading. He asked what I wanted him to do. What he meant by this question was that he wanted me to tell him whether or not he had to absent himself from the class and go stand in the hall while devotions were observed. This was the policy for those who did not wish to participate.

Again, I sensed his dilemma. He did not want to socially distance himself from his peers, all of whom I assume were Christian. I told him that he did not have to go stand in the hall, that he could take his seat while I or someone else would lead in the devotions.

I asked then at the Brookings meetings if Judge Bork thought that a 13-year-old Jewish child should have to be submitted to this kind of conflict, hurt and social embarrassment in order to participate in public education.

Judge Bork in a terse voice and with a stern look on his face responded to me: "Well, I suppose he got over it didn't he?" I was shocked by both the style and content of Bork's response.

As I quickly analyzed his response, I realized that there was no reasonable reply I could make. I knew that I had touched something in Bork that caused a disclosure of his true feelings, which reflected a repressed facet of his personality. Whatever it was, he was willing to subject the youngster to the vulnerability of conflicting authority between parents and teacher, school and synagogue, and to the embarrassment of social ostracism by his peers.

The CHAIRMAN. Your time is up, Reverend, by a long shot. Can you summarize, please, the remainder of your statement, you know, within the next minute?

Reverend DEAN. There was an awkward silence for a few seconds, for me it was an eternity, then Judge Bork gave his own answer. He said that when he was a young boy he had been exposed to a variety of religious beliefs and that it didn't seem to do him any harm.

I do have a number of pages in the rest of my speech, and I will at this time just submit them for the record and will not read them.

The CHAIRMAN. They will all be placed in the record as if read.

Reverend DEAN. But, if you have any questions, I would be happy to respond. And I would like to say again that I think that if this panel passes up the issue of Judge Bork's position on church and state that you, in fact, do a disservice country, to the people of America who are very religious people and who have a lot at stake. His position on that is I think absolutely unacceptable and it can be seen an answer to some of the philosophical and personal questions you have asked here today.

I would like to add one further remark. I do not—I have been asked by many people am I saying by this statement that Judge Bork is anti-Semitic. My unequivocal answer to that is no, I am not saying he is anti-Semitic. But what I am saying is this, and it can be seen in this speech as well as in this incident. He espouses a philosophical understanding of government and system which leaves open the door for others to be anti-Semitic and for others to be racist. While the man personally himself has a record that has been testified to by many fine people, of an attitude that is ecumenical and worthy, he espouses a system which many of us have lived under and which if we had to continue with in the 1960's a lot of people would still be locked up in jail because those cases would not have been removed to the Federal court, they would have been left in the courthouses and the city halls of very racist and very bigoted governments.

[Prepared statement follows:]

TESTIMONY OF THE REVEREND DR. KENNETH L. DEAN
BEFORE THE UNITED STATES JUDICIARY COMMITTEE
SEPTEMBER 28, 1987

First Baptist Church Of Rochester
175 Allen's Creek Rd.
Rochester, NY 14618

MR. CHAIRMAN AND DISTINGUISHED MEMBERS OF THE SENATE, I THANK YOU FOR THE OPPORTUNITY OF COMING BEFORE YOU TODAY. I AM KENNETH L. DEAN OF 3873 ELMWOOD AVENUE, ROCHESTER, NEW YORK, A NATIVE OF ROGERSVILLE, TENNESSEE. I ATTENDED PUBLIC SCHOOLS IN MARYVILLE, TENNESSEE. MY UNDERGRADUATE COLLEGE WORK IS IN PHILOSOPHY FROM CARSON NEWMAN COLLEGE, A SOUTHERN BAPTIST SCHOOL IN JEFFERSON CITY, TENNESSEE. I ATTENDED SOUTHEASTERN SEMINARY IN WAKE FOREST, NORTH CAROLINA. MY BACHELOR OF DIVINITY IS FROM COLGATE ROCHESTER DIVINITY SCHOOL IN ROCHESTER, NEW YORK. I HOLD THE TH. M. DEGREE IN PASTORAL PSYCHOLOGY AND THE DOCTORATE OF MINISTRY FROM THE SAME INSTITUTION. ALL OF MY POST HIGH SCHOOL STUDIES HAVE BEEN AT BAPTIST INSTITUTIONS OF HIGHER LEARNING.

FROM 1965 UNTIL 1970 I WAS THE EXECUTIVE DIRECTOR OF THE MISSISSIPPI COUNCIL ON HUMAN RELATIONS. THIS WORK HAD TO DO WITH RACE RELATIONS AND CIVIL RIGHTS. FROM 1970 TO 1972, I WAS A GRADUATE FELLOW AND INSTRUCTOR IN PASTORAL PSYCHOLOGY AT COLGATE ROCHESTER. ALSO, IN 1970 I ORGANIZED COMMUNICATIONS IMPROVEMENT, INC., A PRIVATE NON-PROFIT CORPORATION IN JACKSON, MISSISSIPPI. UNDER A LANDMARK DECISION WRITTEN BY THEN APPELLATE JUDGE, WARREN BURGER, THIS CORPORATION BECAME THE LICENSE HOLDER OF WLBT TELEVISION, AN NBC AFFILIATE IN JACKSON. I SERVED AS PRESIDENT OF THE CORPORATION UNTIL 1976. AS THE OPERATORS OF MISSISSIPPI'S LEADING BROADCAST FACILITY, IT WAS OUR TASK TO DEVELOP THE NATIONS FIRST BI-RACIAL TELEVISION FACILITY FOR A DEEP SOUTH AREA. WE WERE SUCCESSFUL IN THIS ENDEAVOR AND TODAY JACKSON, MISSISSIPPI HAS THE NATIONS FIRST BLACK-OWNED MAJOR TELEVISION STATION AND A SECOND STATION UNDER THE LEADERSHIP OF A BLACK GENERAL MANAGER. IN 1976, I BECAME THE PASTOR OF PRESCOTT MEMORIAL BAPTIST CHURCH IN MEMPHIS. SINCE

1981, I HAVE BEEN THE PASTOR OF THE FIRST BAPTIST CHURCH IN ROCHESTER, NEW YORK, A CONGREGATION WHERE I SERVED AS STUDENT MINISTER WHILE DOING MY THEOLOGICAL STUDIES. I WAS ORDAINED IN THE SOUTHERN BAPTIST CONVENTION, BUT NOW SERVE AN AMERICAN BAPTIST CHURCH. I AM MARRIED AND HAVE FOUR CHILDREN. THEY ATTEND PUBLIC SCHOOLS IN PITTSFORD, NEW YORK. MY WIFE IS A FAMILY THERAPIST.

ALONG WITH MY WORK ASSIGNMENTS IN RACE RELATIONS AND MINISTRY, SINCE 1967 I HAVE HAD A CONTINUING INVOLVEMENT IN HUNGER AND POVERTY STUDIES. IN 1968 WHEN SENATORS JACOB JAVITS AND ROBERT KENNEDY ASKED ME TO HELP DOCUMENT HUNGER IN THE MISSISSIPPI DELTA, I INITIATED THE HUNGER STUDIES THAT EVENTUALLY LED TO THE HUNGRY CHILDREN REPORT, FOR THE PAST THREE YEARS, I HAVE BEEN A MEMBER OF THE PHYSICIAN TASK FORCE ON HUNGER, OUT OF THE SCHOOL OF PUBLIC HEALTH AT HARVARD UNIVERSITY. IN 1978, I ORGANIZED THE FIELD WORK FOR "HUNGER REVISITED", A TEN YEAR REVIEW OF FEDERAL FOOD PROGRAMS. THIS WORK WAS SPONSORED BY THE FIELD FOUNDATION UNDER THE LEADERSHIP OF DR. LESLIE DUNBAR.

WHILE MY WORK AND STUDIES HAVE AFFORDED ME A BROAD RANGE OF EXPERIENCES, MY HERITAGE IS THAT OF A SOUTHERNER, OF EAST TENNESSEE REPUBLICANISM AND THE EVANGELICAL CHURCH.

IN SEPTEMBER OF 1985, I WAS INVITED TO BE ONE OF ABOUT 35 CLERGY FROM ACROSS THE COUNTRY FOR A WEEK AT THE BROOKINGS INSTITUTION. THE BROOKINGS CONFERENCE FOR LEADERSHIP CLERGY WAS ON "HOW GOVERNMENT MAKES DECISIONS." ONE OF THE FEATURED SPEAKERS FOR THAT CONFERENCE WAS APPELLATE JUDGE, MR. ROBERT BORK. JUDGE BORK'S SPEECH WAS ON "RELIGION AND THE LAW." HE HAD GIVEN A SIMILAR SPEECH AT THE UNIVERSITY OF CHICAGO IN NOVEMBER OF 1984. IN HIS BROOKINGS SPEECH, JUDGE BORK

HANDLED ISSUES WHICH ARE HELPFUL WITH INSIGHT INTO HIS POSITION ON A NUMBER OF CONCERNS OF THE AMERICAN PEOPLE.

BORK WAS INTRODUCED AS A DISTINGUISHED, FORMER PROFESSOR OF LAW AT YALE UNIVERSITY, AS THE SOLICITOR GENERAL WHO FIRED ARCHIBALD COX, AS AN APPELLATE JUDGE AND AS THE PROBABLE NEXT NOMINEE TO THE SUPREME COURT. HE BEGAN HIS TALK WITH A JOHNNY CARSON TYPE MONOLOGUE, THE SUBJECT OF WHICH WAS HIS COMPULSIVE SMOKING. WITH A TOUCH OF HUMOR, HE MENTIONED THE MANY WARNINGS HIS DOCTOR HAD GIVEN HIM ON THE DANGERS OF HIS COMPULSION AND HIS INABILITY TO DO ANYTHING ABOUT IT. THERE WAS BOTH A TOUCH OF CONFESSION AND HUMOR AS HE TOLD US THAT WHAT HE REALLY WAS SAYING WAS THAT HE HOPED WE WOULDN'T MIND HIS PUFFING AWAY WHILE HE LECTURED. FOLLOWING THIS, HE STATED THAT HE WANTED US TO KNOW THAT HIS REMARKS ON RELIGION WERE HIS THOUGHTS ON THE SUBJECT AS IT RELATED TO SOCIETY, AND THAT THEY WERE NOT INTENDED TO SUGGEST SOMETHING HE PRACTICED IN HIS PERSONAL LIFE. HE WENT ON TO POINT OUT THAT HE SUPPOSED THAT, IF A LABEL HAD TO BE PUT ON HIS VIEWS ON RELIGION, IT WOULD BE THAT OF THE AGNOSTIC. HE STARTED TO MOVE INTO THE BODY OF HIS SPEECH, THEN PAUSED FOR A FEW SECONDS, AND STATED THAT HE THOUGHT HE SHOULD CORRECT HIS STATEMENT ABOUT BEING AN AGNOSTIC. HE SAID THAT HE GUESSED IT PROBABLY WAS NOT COMPLETELY CORRECT TO LABEL HIMSELF AN AGNOSTIC, THAT HE DID BELIEVE IN SOME FORM OF RELIGION, BUT THAT IT WAS NOT SOMETHING HE COULD EXPLAIN OR DESCRIBE. ANYWAY, HE SAID THAT WHILE HE PRACTICED NO RELIGION, STILL IT WOULD NOT BE PRECISELY CORRECT TO DESCRIBE HIMSELF AS AN AGNOSTIC.

JUDGE BORK THEN GAVE HIS SPEECH AND WAS FOLLOWED BY A RESPONDENT, DR. JAMES DUNN, EXECUTIVE DIRECTOR FOR THE JOINT BAPTIST COMMITTEE ON

PUBLIC AFFAIRS. THE JUDGE'S ADDRESS WAS FILLED WITH OBSERVATIONS AND CONCLUSIONS THAT WERE IN DEEP AND WIDE DISAGREEMENT WITH MANY OF THE CLERGY. DUNN'S RESPONSE WAS CRITICAL AND VIGOROUS. FOLLOWING DUNN'S REMARKS, THE FLOOR WAS OPENED FOR DISCUSSION. THE QUESTIONS WERE RAPID AND FILLED WITH EMOTION. BORK'S RESPONSES WERE IN LIKE MANNER. THE MAIN EMPHASIS HAD TO DO WITH BORK'S CALL FOR A NEW WEDDING BETWEEN CHURCH AND STATE, A POSTURE AT VARIANCE WITH THE BELIEF AND PRACTICE OF MOST OF THE CLERGY. THIS HEATED DEBATE EVENTUALLY BECAME AN ENTANGLEMENT OF EMOTIONS AND TECHNICALITIES.

AT THIS POINT IN THE DISCUSSION, I ATTEMPTED TO RETURN THE FOCUS TO A MORE CONCRETE ISSUE, SO I ASKED BORK TO RESPOND TO AN EXPERIENCE I HAD AS A JUNIOR HIGH SCHOOL TEACHER AT EDGEWOOD JUNIOR HIGH ON MERRIT ISLAND IN FLORIDA IN 1961. I TAUGHT THERE FOR ONE SEMESTER WHEN I TRANSFERRED MY THEOLOGICAL STUDIES FROM SOUTHEASTERN TO COLGATE ROCHESTER.

I DESCRIBED TO BORK THAT IT WAS THE PRACTICE OF THE SCHOOL TO BEGIN EACH DAY WITH WHAT WAS CALLED "HOME ROOM DEVOTIONS." EACH STUDENT WAS EXPECTED TO TAKE A TURN AT READING THE BIBLE, SOMETIMES LEADING IN THE LORD'S PRAYER AND ALWAYS IN GIVING THE SALUTE TO THE FLAG. THE STUDENT PARTICIPATION WAS BASED ON ALPHABETICAL ORDER OF THE LAST NAME. ONE MORNING, WHEN I ARRIVED AT MY DESK, A THIRTEEN YEAR OLD BOY WAS WAITING FOR ME. HE COMMENTED THAT IT WAS HIS DAY TO LEAD THE DEVOTIONS. HE EXPLAINED THAT HE WAS JEWISH AND THAT HIS PARENTS DID NOT WANT HIM TO LEAD IN THE DEVOTIONS. HE SAID THAT THEY DID NOT WISH FOR HIM TO READ THE NEW TESTAMENT, AS WAS THE CUSTOM. I TOLD HIM THAT HE COULD READ THE OLD TESTAMENT. HE REPLIED THAT HIS PARENTS DID NOT WANT HIM TO

PARTICIPATE IN THE DEVOTIONS AT ALL, THAT THEY BELIEVED THAT RELIGIOUS INSTRUCTION SHOULD BE AT HOME AND IN THE SYNAGOGUE. THE STUDENT AND I HAD A FRIENDLY RELATIONSHIP, AND I COULD TELL THAT HE WAS TROUBLED BY A POSSIBLE SPLIT IN AUTHORITY BETWEEN HIS PARENTS AND MYSELF. HE THEN ASKED, IF HE HAD TO DO THE READING. AWARE THAT THE YOUNG BOY WAS CAUGHT BETWEEN THE AUTHORITY OF SCHOOL AND TEACHER ON THE ONE HAND AND PARENTS AND HOME ON THE OTHER, I TOLD HIM THAT HE DID NOT HAVE TO DO THE READING. HE ASKED WHAT I WANTED HIM TO DO. WHAT HE MEANT BY THIS QUESTION WAS THAT HE WANTED ME TO TELL HIM IF HE HAD TO ABSENT HIMSELF FROM THE CLASS AND STAND IN THE HALL WHILE DEVOTIONS WERE OBSERVED. THIS WAS THE POLICY FOR THOSE WHO DID NOT WISH TO PARTICIPATE. AGAIN, I SENSED HIS DILEMMA, HE DID NOT WANT TO SOCIALLY DISTANCE HIMSELF FROM HIS PEERS, ALL OF WHOM I ASSUMED WERE CHRISTIAN. I TOLD HIM THAT HE DID NOT HAVE TO STAND IN THE HALL, THAT HE COULD TAKE HIS SEAT WHILE I OR SOMEONE ELSE LED THE DEVOTIONS.

I ASKED JUDGE BORK IF HE THOUGHT A 13 YEAR OLD JEWISH CHILD SHOULD HAVE TO BE SUBMITTED TO THIS KIND OF CONFLICT, HURT AND SOCIAL EMBARRASSMENT IN ORDER TO PARTICIPATE IN PUBLIC EDUCATION. JUDGE BORK, IN A TERSE VOICE, AND WITH A STERN LOOK ON HIS FACE RESPONDED, "WELL, I SUPPOSE HE GOT OVER IT. DIDN'T HE?" I WAS SHOCKED BY BOTH THE STYLE AND CONTENT OF BORK'S RESPONSE. AS I QUICKLY ANALYZED HIS RESPONSE, I REALIZED THAT THERE WAS NO REASONABLE REPLY I COULD MAKE. I KNEW THAT I HAD TOUCHED SOMETHING IN BORK THAT CAUSED A DISCLOSURE OF HIS TRUE FEELINGS, WHICH REFLECTED A REPRESSED FACET OF HIS PERSONALITY. WHATEVER IT WAS, HE WAS WILLING TO SUBJECT THE YOUNGSTER TO THE VULNERABILITY OF CONFLICTING AUTHORITY BETWEEN PARENTS AND TEACHER

SCHOOL AND SYNAGOGUE, AND TO THE EMBARRASSMENT OF SOCIAL OSTRACISM BY HIS PEERS. THERE WAS AN AWKWARD SILENCE FOR A FEW SECONDS, FOR ME AN ETERNITY, THEN BORK GAVE HIS OWN ANSWER. HE SAID THAT WHEN HE WAS A YOUNG BOY HE HAD BEEN EXPOSED TO A VARIETY OF RELIGIOUS BELIEFS AND THAT IT DID NOT SEEM TO DO HIM ANY HARM.

AFTER REVIEWING BORK'S SPEECH, I HAVE COME TO BELIEVE THAT HIS HANDLING OF THIS SITUATION ACCURATELY DESCRIBES BOTH HIS PERSONAL FEELINGS AND HIS POSTURE AS A JURIST. HE SUBORDINATES THE INDIVIDUAL TO THE SYSTEM OF GOVERNMENT, EVEN AT THE EXPENSE OF THE FREE EXERCISE AND NO ESTABLISHMENT CLAUSE. I BELIEVE THAT THERE WAS NOTHING EITHER REASONABLE OR COMPELLING IN THE INTEREST OF THE GOVERNMENT OR THE SCHOOL SYSTEM THAT NECESSITATED THE VIOLATION OF THE RIGHTS AND FREEDOM OF THIS YOUNG, JEWISH LAD AND HIS PARENTS. JUST AS THAT WAS THE CASE THEN, I KNOW OF NOTHING IN AMERICAN SOCIETY TODAY THAT NECESSITATES A RETURN TO THIS UNDESIRABLE CONDITION THAT JUDGE BORK'S POSTURE ON RELIGION AND LAW SUGGESTS.

JUDGE BORK'S VIEWS ON "RELIGION AND LAW" DESERVE FURTHER COMMENT IN THAT THEY WEIGH HEAVILY UPON THE SEPARATION OF CHURCH AND STATE. AT THE TIME OF THE FRAMING OF THE CONSTITUTION, BAPTISTS LED THE FIGHT FOR THE DOCTRINE OF SEPARATION. THE BAPTISTS WON THIS BATTLE, AND WHAT THEY HAD IN MIND IS CLEAR. BETWEEN THE EARLY SEVENTEENTH AND LATE 18TH CENTURIES, BAPTISTS IN EUROPE AND AMERICA WERE THE VICTIMS OF HARSH DISCRIMINATION, MANY TO THE POINT OF MARTYRDOM, DUE TO THEIR UNWILLINGNESS TO SUBMIT TO A STATE DOMINATED CHURCH. THEIR RELIGIOUS BELIEF WAS NOT UNORTHODOX, BUT THEIR UNDERSTANDING OF SOCIETY AND RELIGION WAS SUCH THAT THEY BELIEVED EFFECTIVE RELIGION WAS DEPENDENT

UPON THE RIGHT OF THE INDIVIDUAL TO JOIN WITH OTHERS IN WORSHIP AS THEY WERE LED BY THE SPIRIT. FOR THEM, THE SPIRIT LED LIFE WAS SOMETIMES IN CONFLICT WITH THE STATE. IN WHATEVER COUNTRY THEY LIVED, THESE EARLY BAPTISTS CONSIDERED THEMSELVES TO BE LOYAL PATRIOTS. BUT, THEY WERE NOT WILLING TO ACCEPT ANY GOVERNMENT'S CONTROL OF RELIGION WHICH MARKED THEM AT BIRTH AS BELONGING TO A GIVEN RELIGIOUS ORDER. FOR THEM, TRUE RELIGION HAD TO BE THE DECISION OF THE INDIVIDUAL ALONE AFTER THE INDIVIDUAL REACHES AN AGE OF UNDERSTANDING. THIS COMPLETE SEPARATION IS WHAT BAPTISTS ARGUED FOR IN AMERICA. THE RECORD OF HISTORY SUPPORTS THEIR CLAIM, FOR IMMEDIATELY FOLLOWING THE SIGNING OF THE CONSTITUTION, THE INDIVIDUAL STATES BEGAN DISESTABLISHING THEIR STATE DESIGNATED CHURCHES.

IN SUMMARY, THIS SEPARATION MEANT (1) NO CREDAL TEST FOR PARTICIPATION IN SOCIETY, (2) SEPARATE TREASURERS FOR CHURCH AND THE GOVERNMENT, (3) EDUCATION FREE FROM RELIGIOUS COERCION, AND (4) THE ABSENCE OF ANY ORGANIZED POWER CONNECTION BETWEEN THE OFFICES OF GOVERNMENT AND THE CHURCH. UNLIKE WHAT IS FOUND IN SOME EUROPEAN COUNTRIES, PARTICULARY IN MARXIST GOVERNMENTS, THIS SEPARATION PROVIDED FOR FRIENDLY RELATIONS BETWEEN CHURCH AND STATE. SEPARATION DOES NOT IMPLY A HOSTILITY BY THE CHURCH TOWARD GOVERNMENT, NOR DOES IT ALLOW FOR THE SUBORDINATION OF THE CHURCH TO THE STATE. AS DR. WINTHROP S HUDSON, PERHAPS, AMERICA'S LEADING PROTESTANT CHURCH HISTORIAN, STATES WE HAVE THE SEPARATION OF THE INSTITUTIONS OF GOVERNMENT AND CHURCH BUT A DIALOGUE BETWEEN POLITICS AND RELIGION.

JUDGE BORK STATES IN HIS SPEECHES ON RELIGION THAT HE AGREES WIT THE THOUGHT OF RICHARD JOHN NEUHAUS, AS IT IS SET FORTH IN HIS BOOK

THE NAKED PUBLIC SQUARE. THE BORK/NEUHAUS THESIS IS THAT THE SUPREME COURT OF THE LAST FOUR DECADES HAS STRIPPED THE GOVERNMENT OF ALL "SYMBOL AND SUBSTANCE" OF RELIGION. THE STATISTICS ON RELIGION IN AMERICA, SIMPLY CONTRADICT THIS THESIS. WHEN THE CONSTITUTION WAS FRAMED, THE AFFILIATION WITH A CHURCH OR ORGANIZED RELIGION WAS JUST UNDER 10 PER CENT OF THE TOTAL POPULATION. AS THE DISESTABLISHMENT OF THE STATE CHURCHES TOOK PLACE, CHURCH MEMBERSHIP BEGAN TO INCREASE. IT HAS MOVED FROM THE 10 PER CENT MARK OF 1800 TO A PRESENT DAY MEMBERSHIP OF 65 PER CENT OF THE TOTAL POPULATION. IT IS CLEAR FROM THESE STATISTICS THAT THE "FREE CHURCH TRADITION" OF AMERICA HAS LED TO A TREMENDOUS INCREASE IN RELIGION OVER WHAT WE EXPERIENCED UNDER THE STATE CHURCHES OF THE COLONIAL PERIOD. THE VOLUNTARY ASSOCIATION OF AMERICAN LIFE IN RELIGION, WHEN COMPARED WITH THE DISMAL RECORD OF STATE CONTROLLED CHURCHES IN EUROPE, PROVES BEYOND ALL QUESTION THAT ORGANIZED RELIGION IN AMERICA, AS IMPERFECT AS IT IS, REMAINS A FAR BETTER PATTERN THAN WHAT IS FOUND ANYWHERE IN THE WORLD.

JUDGE BORK ASSERTS IN HIS SPEECHES ON RELIGION, "THERE MAY BE IN MAN AN INERADICABLE LONGING FOR THE TRANSCENDENT. IF RELIGION IS OFFICIALLY REMOVED FROM PUBLIC CELEBRATION, OTHER TRANSCENDENT PRINCIPLES, SOME OF THEM VERY UGLY INDEED, MAY REPLACE THEM." HE GOES ON TO COMPLIMENT NEUHAUS AND ADDS, "THE PUBLIC SQUARE WILL NOT REMAIN NAKED. IF RELIGION DEPARTS, SOME OTHER PRINCIPLE -- PERHAPS POLITICAL OR RACIAL -- WILL ARRIVE."

AGAIN, BORK, HAS TOO NARROW A VIEW OF RELIGION. HE CLAIMS THAT THE SYMBOLS OF RELIGION AND THE OBSERVANCE OF RELIGIOUS RITUAL MUST BE RE-INTRODUCED INTO THE PUBLIC SQUARE (GOVERNMENT) LEST THE VOID BE FILLED

WITH EVIL. HOWEVER, IN THE PROPHET ISAIAH WE HAVE A DIRECT STATEMENT ABOUT THE CONDITION BORK ATTEMPTS TO ADDRESS. IN ISAIAH 58, THE JEWISH PEOPLE HAVE RETURNED FROM CAPTIVITY IN BABYLON AND ARE REBUILDING THEIR CITY AND COMMUNAL LIFE (THE PUBLIC SQUARE). THEY "HANG THEIR HEADS" AND "LIE DOWN IN SACKCLOTH AND ASHES", (PRAYER AND RITUALISTIC CELEBRATION) BUT GOD DOES NOT HEAR THEIR PRAYER OR VISIT THEM FOR THEY EMPHASIZE BUSINESS OVER RELIGION, OPPRESS THEIR WORKMEN FOR THEIR OWN PROFIT, QUARREL AND STRIKE THE POOR. THE PROPHET GOES ON TO TELL THE PEOPLE THAT GOD WILL VISIT THEM WHEN THEY IDENTIFY WITH THE OPPRESSED, SHARE THEIR BREAD WITH THE HUNGRY, SHARE THEIR HOMES WITH THE HOMELESS, AND CLOTHE THE NAKED. GOD MEETS THE PEOPLE, (HE APPEARS IN THE PUBLIC SQUARE), NOT IN THEIR CEREMONY AND REPETITIOUS PRAYERS, RATHER WHEN THEY IDENTIFY WITH THE POOR. THIS IS TRUE WORSHIP. AS STRANGE AS IT MAY SEEM, ACCORDING TO THIS TEXT, GOD IS A SECULAR HUMANIST! GOD MAKES CARING FOR HUMAN NEEDS THE PRE-CONDITION FOR HIS APPEARANCE IN THE PUBLIC SQUARE. THIS FOCUS IS THE MAJOR COMPONENT OF SECULAR HUMANISM. GOD NOT ONLY DEMANDS THE FOCUS ON HUMAN NEED, HE REJECTS CEREMONY, RITUAL AND SYMBOL AS WORTHY WORSHIP IN AND OF ITSELF. GOD CALLS FOR THAT WHICH BORK AND THE RIGHT WING EVANGELICALS FEAR TO TAKE UP OCCUPANCY IN THE PUBLIC SQUARE. THAT WHICH TODAY IS CALLED SECULAR HUMANISM, ACCORDING TO THE BIBLE, IS THE PREREQUISITE FOR THE APPEARANCE OF THE TRANSCENDENT.

THIS WEEK BY DAUGHTER CARRIED CANS OF FOOD TO SCHOOL FOR THE LOCAL FOOD PANTRY. THIS WAS A RELIGIOUS ACT, BUT IT DOES NOT VIOLATE THE SEPARATION OF CHURCH AND STATE. FOR THE LAST THREE YEARS, I HAVE TRAVELED FROM ONE END OF OUR COUNTRY TO THE OTHER STUDYING PROBLEMS OF

HUNGER AND THE HOMELESS. EVERYWHERE I WENT I FOUND MAINLINE CHURCHES AND SYNAGOGUES FEEDING, CLOTHING AND HOUSING THE POOR. RARELY, IF AT ALL, DID I FIND THE RIGHT WING EVANGELICALS, WHOM BORK SUPPORTS IN THEIR ATTEMPT TO GAIN CONTROL OF THE PUBLIC SQUARE INVOLVED IN THESE SERVICES TO THE POOR. I ASSERT THAT RELIGION IN AMERICA IS NOT AS SICK OR ABSENT AS BORK AND NEUHAUS FEAR.

IN CLOSING, I WOULD LIKE TO ADDRESS A COMMENT THAT APPEARED IN THE NEWSPAPER AND WHICH WAS ATTRIBUTED TO SENATOR HEFLIN. THE REPORT SAID THAT THE SENATOR WISHED THAT HE WAS A PSYCHIATRIST INSTEAD OF A LAWYER, SO HE COULD UNDERSTAND JUDGE BORK. IT IS CLEAR TO ME THAT JUDGE BORK IS AN ACTIVIST. THERE IS NOTHING WRONG WITH HAVING AN ACTIVIST ON THE SUPREME COURT, EXCEPT THAT IT IS NOT CLEAR WHAT BORK'S GOALS ARE. ONE NEEDS TO KNOW THE GOALS OF AN ACTIVIST. ARE HIS GOALS THOSE OF THE RIGHT WING EVANGELICALS? THIS SEEMS VERY UNLIKELY, SINCE SECTARIAN EVANGELICALS ABHOR ANY ASSOCIATION WITH VAGUE RELIGION TINGED WITH AGNOSTICISM. FOR DECADES THEY HAVE CRITICIZED LIBERAL RELIGION ON THESE GROUNDS. THE ONLY TWO POINTS OF AGREEMENT BETWEEN THE SECTARIAN EVANGELICALS AND BORK THAT I CAN FIND ARE THEIR CRITICISM OF THE SUPREME COURT DECISIONS AND THE RECORD OF EACH ON RACE. AND, IT IS THE AGREEMENT ON THESE TWO POINTS THAT GIVES BLACKS AND PROGRESSIVE MINDED WHITES JUST CAUSE FOR CONCERN. IN BORK'S IDENTIFICATION WITH THE SEGREGATIONIST EVANGELICALS, WE SEE A MAN WHO HAS MOVED FROM ONE POLITICAL CONVICTION TO ANOTHER IN SEARCH OF A POLITICAL CONSTITUENCY. HE EMBRACES THE EXTREMES OF WHAT IS USUALLY CONSIDERED OPPOSITE POLITICAL PHILOSOPHIES AND COMBINES THEM INTO A POSITION THAT REFLECTS NEITHER OF THE DOMINANT POLITICAL PARTIES IN AMERICA. IF I WERE A

PERSON WHO WANTED TO SEE THE APPOINTMENT OF A JURIST TO THE HIGH COURT, WHO HAS THE POTENTIAL FOR CREATING DIVISIVENESS, CONFLICT AND SOCIAL DISCORD IN AMERICAN LIFE, THEN, I WOULD SUPPORT JUDGE BORK. HIS RECORD ON RACE, HIS STATEMENT CONCERNING PRIVACY, HIS POSITION CONCERNING WOMEN'S RIGHTS, HIS STANCE ON CHURCH AND STATE, AND HIS ATTITUDE TOWARD THE INDIVIDUAL COMBINE WITH HIS AMORPHOUS POLITICAL STANCE AND STYLE IN A WAY THAT MAKES HIM A HIGH RISK NOMINEE. AT THIS JUNCTURE IN OUR HISTORY, THERE IS NO NEED FOR US TO TAKE SUCH A RISK. I HOPE THAT THE WISDOM OF OUR SENATE WILL CONCUR IN THIS JUDGEMENT. IF NOT, WE WILL HOLD JUDGE BORK IN OUR PRAYERS, AS WE DO ALL OFFICIALS IN THE PUBLIC SQUARE.

The **Chairman**. Thank you very much.

Senator Thurmond.

Senator **Thurmond**. I yield to Senator Specter.

The **Chairman**. Senator Specter.

Senator **Specter**. Reverend Dean, you ran out of time in the midst of your description of the encounter with Judge Bork. I would like you to finish it.

Reverend **Dean**. The whole paper?

Senator **Specter**. No, specifically the discussion you had with Judge Bork. As I understand it, this was an event where you personally participated.

Reverend **Dean**. That's correct.

Senator **Specter**. So you're an eyewitness.

Reverend **Dean**. That's correct.

Senator **Specter**. You made a comment and Judge Bork made a response within your presence and your hearing.

Reverend **Dean**. That's correct.

Senator **Specter**. Had you finished your description of that event?

Reverend **Dean**. I finished my description of that exchange concerning his response to the issue of a young Jewish boy not wanting to participate in devotions.

Senator **Specter**. Well, you said there was an eternity, after he made his comment, that he'll get over it, something to that effect. What did he say specifically?

Reverend, do you recall?

Reverend **Dean**. I've written it down here.

"Well, I suppose he got over it, didn't he?"

Senator **Specter**. All right. Then you said it seemed like an eternity to you before something else was said or something else occurred. What happened next?

I believe it was at that point that you ran out of time.

Reverend **Dean**. The next thing that happened was—I think the hands and the voices of the people in the meeting were cuffed, because how do you respond to this? This is a nonrational statement. And how can you give a rational response——

Senator **Specter**. Reverend, aside from your characterization of it, what happened next? Who said what?

Reverend **Dean**. What happened next was Judge Bork spoke.

Senator **Specter**. And what did he say?

Reverend **Dean**. My summarization of what he said was that he, himself——

Senator **Specter**. Have you written it down?

Reverend **Dean**. Yes, yes. He said that when he, meaning Judge Bork, was a young boy, he had been exposed to a variety of religious beliefs and that it did not seem to do him any harm.

Senator **Specter**. And what, if anything, was said next?

Reverend **Dean**. I think someone else asked another question.

Senator **Specter**. Do you recall what that question was?

Reverend **Dean**. No, I do not.

Senator **Specter**. Did anything more occur at this meeting beyond what you have described, as to this specific exchange?

Reverend **Dean**. As to this specific exchange, no. I think my recall of the meeting is that it had been so filled with emotion and anger and debate, which was very vigorous, that there was a desire to kind of wind it down.

Senator SPECTER. And then it did wind down?

Reverend DEAN. It did, in a few minutes.

Senator SPECTER. Reverend Dean, you have described a situation where you have participated or been the spiritual leader in what essentially is a school prayer exchange, correct?

Reverend DEAN. That's correct, and that's what I was attempting to find out from Judge Bork, what his position was on that.

Senator SPECTER. And are those who participate in the exchange, including the young Jewish boy of 13 whom you described, given the option of participating or not?

Reverend DEAN. This was in 1961, you understand, and things have been changed since then. Yes, if they didn't want to participate, they could absent themselves from the room and stand in the hall. I was not aware of the religious belief of anybody in the class. I went into the class during the middle of the year and this happened some 2 or 3 weeks after I had been there.

As it turned out, my assumption was later that this was the only Jewish kid in the class, that the rest of them were Christians.

Senator SPECTER. You had not known that at the time?

Reverend DEAN. No.

Senator SPECTER. Had you known it, what would your method have been for dealing with the situation?

Reverend DEAN. If I had known it, I would have talked to him beforehand.

Senator SPECTER. Mr. Chairman, may I have a moment or two more?

The CHAIRMAN. Sure.

Senator SPECTER. You have described a situation in 1961, Reverend Dean, and you have described it in very sympathetic terms. What is your preference for the practices with school prayer in 1961 or the practices prohibiting vocal prayer today?

Reverend DEAN. As I have said further on in this text, I see no compelling reason that a kid's rights or his family's rights should be violated in this fashion. My preference would be for a strong separation of church and state, with the function of religion remaining in the home, in the synagogue, and the church just as this boy indicated. I think that Judge Bork makes what I'm sure people in America will find a strange argument for a reclothing of government in a religious garb, with symbol and substance, he says. By this, of course, he is meaning bringing ritual and this kind of thing back into the arena of government.

I think the American people ought to know that and the implications of it. He is suggesting that we move toward basically a European style of church and state relationships. But the church in America, and religion in America, is far more vigorous and far more vital than anywhere in the world. I think that when we tamper with that, we're tampering with something that is very dear to the success of what's made America great.

Senator SPECTER. Well, Reverend Dean, where do you find that in Judge Bork's writings or statements? He has submitted to this committee the text of two speeches, one at the University of Chicago——

Reverend **Dean**. Correct.

Senator **Specter** [continuing]. And one at the Brookings Institute, both of which I have read and reread and re-reread. He does not take a position in the texts of those speeches in favor of school prayer.

He talks about the privatization of morality, he talks about John Stuart Mill, he talks about his disagreement with the obscenity cases, he talks about Justice Harlan's decision on "one man lyric," et cetera, and he stops short, as I recall reading those speeches—and as I say, I have read them recently—he stops short of taking a position on the issue of school prayer.

Reverend **Dean**. I think that's incorrect.

Judge Bork asserts in his speeches on religion "There may be in man an ineradicable longing for the transcendent. If religion is officially removed from public"——

Senator **Specter**. Where does he say that? You're reading from your statement.

Reverend **Dean**. This is a quote from his speech that he gave—I think this quote is in both Brookings and the Chicago speech.

Senator **Specter**. Are you now referring to your statement?

Reverend **Dean**. I have in my statement a quote from Judge Bork——

Senator **Specter**. Yes. Well, I just want to follow your text, if you would refer me to the page.

Reverend **Dean**. It's on page 8, the second paragraph from the bottom. "There may be in man an ineradicable longing for the transcendent. If religion is officially removed from the public celebration, other transcendent principles, some of them very ugly, indeed, may replace them."

Judge Bork in his speech goes on to compliment Newhouse and adds, "The public square will not remain naked. If religion departs, some other principle, perhaps political or racial, will arrive."

By "public square," I take it that can mean nothing else except government and the institutions thereof, one of which is our public schools.

Senator **Specter**. Well, that isn't the necessary implication, Reverend Dean, as I read that statement, in fairness to all parties. You may be talking about nativity scenes, you may be talking about prayer in the Nebraska Assembly, you may be talking about prayer in the U.S. Senate.

Do you have anything more specific than what you have quoted here as authority for your conclusion that Judge Bork favors school prayer?

Reverend **Dean**. If you take this speech, and remember that it began with an issue over a decision relating to a program in New York City——

Senator **Specter**. The *Aguilar* case.

Reverend **Dean**. Right.

Senator **Specter**. The earlier speech in Chicago was before the Supreme Court had the case, and the latter speech was after the Supreme Court had decided it. That turned on the issue of some public funding, where New York City paid for some school teachers' salaries and school employees in a parochial school.

Reverend **Dean**. That's correct.

My point would be that, in that case, you essentially have a mixing of treasurers between church and state. If you mix treasurers, then you eventually dictate interest and policy. The mixing of the Treasury of the government with the treasury of the church has, in history, led to a dictation of positions concerning liturgy, prayer, ritual, or whatever.

So I think that the two are, in fact, consistent.

Senator SPECTER. Reverend Dean, I don't disagree with the sense that treasuries ought not to be mixed. I believe that is sound public policy. Actually, the *Aquilar* case turned on something different than that. It turned on the establishment clause; it turned on the fact that New York City monitored the use of the public funds in the Catholic school. It didn't turn on the mixture of the treasuries. It turned on the intervention of the city officials in the way the funds were administered, and that constituted an establishment. So said the Supreme Court of the United States, which is slightly different, as a legal matter, from mixing of the treasury.

Reverend DEAN. I understand that. But it was the mixing of the treasuries that caused the question.

Senator SPECTER. Well, that's true, but the operative facts which led to the Court's decision were the facts that the Court said, once the city intervened in the administration of the schools, that the city was part of the establishment and that they were administering, in effect, a parochial school in violation of the establishment clause of the first amendment.

But agreeing with your proposition—and I think that it is important that these issues be fully framed. I am aware of the import as to what you say about the 13-year-old Jewish child. I'm aware of that. I have heard your testimony on Judge Bork's response. It may be that Judge Bork will want to respond to that, I don't know. It may be that he will want to respond. That's a fact question and what the inferences are from that we have to decide on the committee, as to what weight to give it, and we would, of course, I think give Judge Bork an opportunity to respond factually.

But it is different, I think fundamentally different, as to whether Judge Bork can be said to favor school prayer. We had a brief discussion this morning with Professor Kurland on that subject, and the *Vitale* case was something we discussed. It would be my sense that, as a matter of basic fairness, that if you turned the language such as "There may be in man an ineradicable longing for the transcendent. If religion is officially removed from public celebration, other transcendent principles, some of them very ugly, indeed, may replace them", and then add, "The public square will not remain naked. If religion departs, some other principle, perhaps political or racial, will arrive," my interpretation from that would not be to charge the author, Judge Bork, with a stated preference for vocal prayer in schools.

Reverend DEAN. May I respond?

Senator SPECTER. Sure.

Reverend DEAN. I would like to push the issue a step further.

Senator SPECTER. Okay.

Reverend DEAN. The predicate of this statement which you have read is an issue of fear. Would you agree with that?

Senator **Specter**. No. I think the predicate could be a great many things. But I wouldn't want to speculate on the predicate. I would be willing to listen to your interpretation, your suggestion, or even your argument, but I would not want to make any inference of a predicate which would bind the speaker, who is Judge Bork.

Reverend **Dean**. "If religion is officially removed from public celebration, other transcendent principles—" meaning a transcendence other than that which is religious, that means evil transcendence, right? "—some of them very ugly—" and evil is ugly "—indeed, may replace" the religious transcendence, okay?

There is a fear here that if religion is removed, a void will be left and something that is nonreligious and ugly and evil will replace it. That's fear. I think that is terribly important to understanding what is happening here.

"The public square will not remain naked." In other words, if religion is taken out. "If religion departs, some other principle, perhaps political or racial, will arrive."

While in this sentence, in and of itself, it does not use the word "prayer," the most fundamental part of prayer, as religion has been organized from the human side, as religion has been organized, is prayer. So I don't see how you could exclude it.

Senator **Specter**. Well, I think I have your point. I have trespassed on Senator Humphrey's time, and I perhaps would defer to Senator Humphrey to pursue this issue further.

The **Chairman**. Senator Humphrey.

Senator **Humphrey**. Thank you.

Reverend Dean, I'm glad that you made clear that you are not accusing Judge Bork of anti-Semitism. Nonetheless, there may be some lingering concern on the part of those who heard your description of a purported response that Judge Bork made to a case that you described involving a 13-year-old boy. I just want to clear the air, if I can here, once and for all, about any lingering doubts that Judge Bork is anti-Semitic by stating a few facts.

First we heard from Mr. Crane a moment ago, Howard Crane, who is Jewish and who was nearly denied a job at the firm where Robert Bork worked as a young lawyer some years ago. Robert Bork, a very junior member of the firm, stood up for this man, Howard Crane, who he hardly knew at all, and persuaded the senior partners to drop this quota system they had which discriminated against Jewish lawyers. So that's point one.

Point two, for those who have any lingering doubts, is this: they should know that Robert Bork's first wife, who died tragically of cancer, was Jewish. And some of the most important influences in the professional life of Robert Bork likewise are members of the Jewish community. We've heard Professor Alexander Bickel's name mentioned a few times, and also Aaron Director.

Now, with regards to what you say you heard Judge Bork say at this Brookings Institution hearing, it is clear from the way you describe the scene to Senator Specter that a number of other people with you heard Judge Bork say what you purported he said, because you said the others were as dumbfounded as you were. So it is clear that others were there, and, indeed, there were.

I want to read, Mr. Chairman, passages from letters from other people who were there which I think completely puts to rest the charge, if that is what it is, that the appearance of this witness has raised.

Warren Cikins, who is the Brookings Institution official who organized and attended the event, wrote in a letter to the Washington Post, after this had gotten into the news, in which he stated, "In examining my notes of the meeting, I find no reference to any specific Supreme Court decision but only the expression of broad concepts and principles. I find no opinion expressed by the Judge on the issue of school prayer but only the comment that the current turmoil in constitutional law may force some revisions."

Now, a little bit more to the point, there were others there who were at least as sensitive as you, and perhaps more sensitive, those who had reason to be more sensitive, one of whom was Joshua O. Haberman of Washington, DC. Let me read this letter that he sent to the Washington Post, which was published on August 6 of this year.

"It's a good thing I was there when Judge Robert Bork met with a group of clergy at the Brookings Institution dinner for religious leaders in September of 1985, because if I had nothing but the Post's account of that evening, I would draw entirely wrong conclusions about Judge Bork's views on church and state issues."

Mr. Haberman goes on. "The Post's reporter was not present at the meeting. I was. As a rabbi with a strong commitment to the separation of church and state, I would have been greatly alarmed—"and no doubt he would"—I would have been greatly alarmed if Judge Bork had expressed any tendency to move away from our Constitution of religious freedom and equality. I heard nothing of the sort. In fact, the Judge showed great sensitivity to the ambiguities and dilemmas of the first amendment. During an extraordinarily long exchange with the assembled clergy, Judge Bork was cautious, yet candid and openminded. He threw back at us as many questions as he answered, a Socratic approach I found most stimulating.

"I do not recall the Judge's ever stating how he would vote on matters such as prayer in public schools. Rather, I gained the impression that Judge Bork favors a pragmatic approach to the most controversial church and state issues, with all sides developing more flexibility. He sees a need to pull back from the growing polarization on these issues which is highly damaging to the country and to religious bodies. He also sees a need to give some public recognition to the role of religion in our history and national life, short of promoting one or other religious dogma or ritual under state auspices—" that's short of. I'm nearly finished.

Let me repeat that sentence. "He also sees a need to give some public recognition to the role of religion in our history and national life, short of promoting one or the other religious dogma or ritual under state auspices, a policy that is now advocated even by the staunchly liberal People for the American Way." As I say, that letter was written by Joshua O. Haberman, who is a rabbi and who lives here in Washington.

[Material referred to above follows:]

The Brookings Institution

1). MASSACHUSETTS AVENUE N.W. / WASHINGTON D.C. 20036 / CABLES: BROOKINST / TELEPHONE: (202) 797-6000

Center for Public Policy Education

July 28, 1987

To the Editor
The Washington Post

Dear Madame:

I am quite concerned about the article of Al Kamen on Thursday, July 28 which made reference to a Brookings Seminar for Religious Leaders which Judge Robert H. Bork addressed on Thursday, September 12, 1985. When Mr. Kamen asked me about the Seminar, I replied that it was my understanding as the Chairman of that meeting that the meeting was off-the-record. Since other attendees have elected to report their recollections of the meeting, I thought, in fairness, that I should also respond to their comments.

Whatever one's views are about Judge Bork's qualifications to serve on the Supreme Court, he certainly is entitled to a thorough and accurate review of his opinions. In examining my notes of that meeting, I find no reference to any specific Supreme Court decision, but only the expression of broad concepts and principles. I find no opinion expressed by the Judge on the issue of school prayer, but only the comment that the current turmoil in constitutional law may force some revisions.

One must remember that the context of this session at Brookings was the airing of a wide range of views on matters of Church and State, in an aura of reconciliation not confrontation. While Judge Bork was challenged frequently by members of the Seminar, he responded with grace and an inquiring mind, and willingly extended the discussion period well beyond its adjournment time.

Let the debate on Judge Bork's confirmation go forward on its merits, in this same aura of the tenacious but gracious pursuit of the truth!

Sincerely,

Warren I. Cikins
Senior Staff Member

THURSDAY, AUGUST 6, 1987 THE WASHINGTON POST

LETTERS TO THE EDITOR

The Meaning of Murder

Richard Cohen [magazine, July 19] claims that men of the U.S. Army air forces were murderers of civilians from the air. My Webster's New World (1960 edition) defines murder as "the unlawful and malicious or premeditated killing by another." As a pilot of B-24 bombers based in Italy, I flew 30 missions to targets in Austria, Germany, Yugoslavia and northern Italy. Our targets were largely railroad marshaling yards, oil refineries and factories producing war goods. No doubt civilians were killed, but equating these deaths with those in the German death camps, the rape of Nanking, the Bataan death march or other events is absurd. Mr. Cohen has rewritten history and defamed honorable men, living and dead.

SAMUEL F. STREET
Salisbury

'My Cheap Labor'

I am a former farm worker from Florida who has worked in picking citrus fruit and tomatoes. With regard to the article on the Eastern Shore migrant workers [July 25], I basically agree that worker housing in Virginia and other states is a disgrace, but I totally disagree that the taxpayer should have to subsidize agribusinesses with low-interest loans from state funds. Eastern Shore farm workers are the only workers I know of who have had a pay decrease in the last 10 years. We used to get paid 40

The Bork Nomination (Cont'd.)

It's a good thing I was there when Judge Robert Bork met with a group of clergy at a Brookings Institution dinner for religious leaders in September 1985, because if I had nothing but The Post's account of that evening [front page, July 28], I would draw entirely wrong conclusions about Judge Bork's views on church-and- state issues.

The Post's reporter was not present at the meeting. I was. As a rabbi with a strong commitment to the separation of church and state, I would have been greatly alarmed if Judge Bork had expressed any tendency to move away from our constitutional guarantee of religious freedom and equality. I heard nothing of the sort.

In fact, the judge showed great sensitivity to the ambiguities and dilemmas of the First Amendment. During an extraordinarily long exchange with the assembled clergy, Judge Bork was cautious, yet candid and open-minded. He threw back at us as many questions as he answered—a Socratic approach I found most stimulating.

I do not recall the judge's ever stating how he would vote on matters such as prayer in public schools. Rather, I gained the impression that Judge Bork favors a pragmatic approach to the most controversial church-and-state issues, with all sides developing more flexibility. He sees a need to pull back from the growing polarization on these issues, which is highly damaging to the country and to religious bodies. He also sees a need to give some public recognition to the role of religion in our history and national life, short of promoting one or the other religious dogma or ritual under state auspices—a policy that is now advocated even by the staunchly liberal People for the American Way.

JOSHUA O. HABERMAN
Washington

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The Post is to be commended for what appears to be a surprisingly evenhanded series of articles on Judge Bork by Dale Russakoff and Al Kamen [July 26, 27, 28].

I now understand better why there has been such rabid opposition to Judge Bork's nomination to the Supreme Court. The judge has apparently committed at least two cardinal sins: he kept an open mind as he grew older and matured, and he "converted" from liberalism/socialism/leftism to a philosophy reflected by the pragmatic old cliché: if you're not a socialist at 20, you don't have a heart; if you're still a socialist at 30 (or 40), you don't have a brain.

Judge Bork also apparently believes that if a law or the Constitution doesn't allow, or disallow, an action, then a judge should not give or take away. I find that hard to argue with. But then I have tried to keep my mind from closing.

WALTER M. PICKARD
Alexandria

Senator HUMPHREY. Mr. Chairman, I don't know whose idea it was to call Reverend Dean, but if the idea was to create the impression of anti-Semitism, it's rubbish. If the idea is to create the impression that, in private, or in the Brookings Institution, Robert Bork called for some kind of state-sponsored religion, that, too, is rubbish. I find this whole episode of this last half hour easily the most distasteful of this entire two weeks of hearings.

Again, I don't know who recommended or who is responsible for calling this witness, but it stinks.

The CHAIRMAN. Let me respond to that.

I asked the same question 2 minutes before the witness was called. I was told that staff had asked Reverend Dean to testify, or asked if he wished to testify, and as a consequence of an exchange that had taken place between Judge Bork and Senator DeConcini regarding the Washington Post story.

I should note for the record that not only has the witness not said that Judge Bork is anti-Semitic, but he expressly said he did not believe he was. I should point out for the record that Judge Bork's first wife was Jewish——

Reverend DEAN. I know that.

The CHAIRMAN. I have known of no one who has indicated otherwise. But it related to the following testimony; that is, on page 259 of the transcript, where Senator DeConcini says, "Well, first, do you remember an exchange with Reverend Kenneth Dean?" Judge Bork, "No, I do not, and I'm certain that I did not say a thing like that about 'a Jewish boy will get over it.' There has been some discussion of my relationship." Senator DeConcini: "If Reverend Dean said that you did say that, your answer to that next week is going to be that he was mistaken?" Judge Bork: "I certainly am. I do not know what I said, but if I said anything, it must have been in front of a group. And I earlier introduced into the record, Senator, letters. Somebody also said I endorsed school prayer. I did not know what was going on that night, but I did not endorse school prayer. I never thought those cases—I never really thought about the problem and I certainly did not wait until I became a judge to go over and talk to an audience about endorsing school prayer."

That is in the record. I yield to the Senator from South Carolina.

Senator THURMOND. Thank you very much, Mr. Chairman.

You're a Baptist preacher, I believe?

Reverend DEAN. That's correct.

Senator THURMOND. I'm a Baptist, too, but I don't agree with you coming here and saying the things you did.

Reverend DEAN. I didn't come here on my own. I was invited here, your Honor.

Could we clarify that, Mr. Chairman?

Senator THURMOND. I believe you admitted—I'm glad you have—that you don't think Judge Bork is anti-Semitic. I believe you did say that, didn't you?

Reverend DEAN. That's not my concern. That's correct.

Senator THURMOND. You don't think he's anti-Semitic, do you?

Reverend DEAN. No, I do not.

Senator THURMOND. Well, Mr. Cikins, who had charge of that seminar, and who describes himself as a devout Jew, says he finds no reference—he kept notes—to any specifics to Supreme Court decisions but only an expression of broad concepts and principles. And he made this statement: "I find no opinion expressed by the Judge on the issue of school prayer."

So if there was an article in the Washington Post, and I presume there was, from what has been said, it must have been in error. So I think the people that had you here had you on the assumption that the statement in the Washington Post was correct, but it has turned out to be incorrect. So I imagine, in view of that, that you would want to apologize to the committee.

Reverend DEAN. I have no apology to make whatsoever. I am testifying here under oath, and I testified that what I have reported to you is, in fact, true. If Judge Bork wants to explain to himself what he meant by that, you have the freedom of calling him back here.

I would like to say one other word about the questions of anti-Semitic. My concern, as I have told you, is not the issue of his personal feelings in a one-to-one relationship. Senator Thurmond and I both come from a tradition in the South in which for a long time we have talked about, in a personal way, how we have related to and liked black people. But we also participate in a system which left open, in a political way and a legal way, for others to be very discriminatory.

I think that the position of Judge Bork, as it is outlined in his speeches—you all are lawyers, and you can look at it and analyze it—I think it leaves open a statim view of society which pushes the issue back of prejudice, whether it be with blacks or whites, to the local level. I think that his record of his writings on civil rights are ambiguous enough that it makes him a high-risk candidate for the Supreme Court, and the United States, at this point, does not need to take a high-risk candidate when we have many fine, qualified legal people of a conservative persuasion.

The CHAIRMAN. Thank you very much.

Senator THURMOND. Now, just a minute. You say you don't think he's anti-Semitic, and since the evidence is clear that he didn't make any statement that was quoted correctly about that seminar, there is really no basis for your statement here today, was there? These other statements you made are off the cuff on your own.

Reverend DEAN. Mr. Cikins' statements, I know Warren Cikins and he used to be an aide to Brooks Hayes from Arkansas, a dear friend of mine.

Senator THURMOND. Mr. Cikins is a good man. I know him, and he's with the Brookings Institute.

Reverend DEAN. That's correct. And his statements there refer to the speech, not to the exchange.

Senator THURMOND. Are you willing to take his statement, that "I find no opinion expressed by the Judge on the issue of school prayer?" I mean, that's the main thing you have based your testimony on here.

At any rate, from the information you have presented here today, it was hardly worth your while to come here, wasn't it?

Reverend DEAN. It was very important for me to come here. Even if my testimony is rejected completely, I have spoken the truth as I experienced it, and I thank you distinguished gentlemen for allowing me to be here.

The **Chairman**. Let me make it clear the two points here. One Mr. Cikins speaks to, one he does not. The first point was whether or not how Judge Bork responded to your reference to your experience in 1961; that is one issue. The second issue is whether or not Judge Bork endorsed or did not endorse prayer in school.

Warren Cikins said he drew a conclusion similar to the one that Senator Specter drew from reading Judge Bork's speeches. That is, that he has no recollection of the Judge concluding—he only spoke to the second issue, of whether or not Judge Bork endorsed school prayer.

I thank you very, very much for your testimony. The hearing is adjourned until tomorrow morning at—is recessed until tomorrow morning at 10 o'clock.

[Whereupon, at 5:27 p.m., the committee adjourned to reconvene at 10 a.m., Tuesday, September 29, 1987.]

NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

TUESDAY, SEPTEMBER 29, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:06 a.m., in room SR-325, Russell Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Thurmond, Hatch, Simpson, Grassley, Specter, and Humphrey.

The CHAIRMAN. The hearing will come to order.

I thank the witnesses for being here on time. We have a distinguished panel on the issue of privacy this morning. Our first panel member is Herma Hill Kay, professor of law at the University of California, Berkeley. She has significant professional experience, including being a law clerk to Justice Roger Traynor of the California Supreme Court from 1959 to 1960. She is the author of textbooks on the issue of sex-based discrimination and a very distinguished and published scholar.

Also we have David A.J. Richards, a professor of law at New York University, a graduate of Harvard and Oxford University. He published numerous articles and books, including "Toleration and the Constitution" in 1986.

And Kathleen Sullivan is a professor of law at Harvard University, and she has a considerable amount of experience in the area of constitutional law, criminal law and local government law. She has been very involved in Supreme Court efforts and also in issues relating to privacy.

I apologize for not reading the whole of your background, which is distinguished, all three of you; but in the interest of time, I will leave it at that.

I will ask you all three to please stand to be sworn.

Do you swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Ms. KAY. I do.

Mr. RICHARDS. I do.

Ms. SULLIVAN. I do.

The CHAIRMAN. Thank you.

Senator KENNEDY. Mr. Chairman, just for a moment I want to welcome the panel, particularly Professor Sullivan, who I found is highly regarded in not only the academic community in our part of the country, but nationwide. It is a pleasure to have her here.

The CHAIRMAN. Thank you, Senator. We are anxious to hear from all three of you. Obviously, you have observed we are trying very hard to keep within a 5-minute rule on presentation. You will have time to expand on your statements during the question-and-answer period.

So to the extent to which you can keep your statements to 5 minutes, it will do two very important things for us: Number one, it will set the pattern for the rest of the day so we are able to finish at a reasonable hour this evening; secondly, it will keep Senator Thurmond from whispering in my ear the remainder of the day. When Senator Thurmond whispers in my ear, I listen and the message is coming across loud and clear: Let us get this thing moving. It would be very helpful to me.

Senator THURMOND. Mr. Chairman, we have so many witnesses. I was just looking at the list. If we do not keep them to 5 minutes and the Senators, too, to 5 minutes, we will be here until 12:00 o'clock tonight. So thank you very much if you can keep it to 5 minutes.

There is a little light there. When that turns red, your time is up.

The CHAIRMAN. Would you set the clock, please?

If it goes beyond that, Senator Thurmond will come over the table personally to speak to you.

Senator THURMOND. You are the Chairman; that is your job.

The CHAIRMAN. Well, I would delegate you that job, Senator Thurmond.

Let us begin, and maybe we could begin with you, Professor Kay, unless you have another order preference, however you would like to go.

Ms. KAY. That is fine.

The CHAIRMAN. All right. Please proceed.

TESTIMONY OF A PANEL CONSISTING OF: HERMA HILL KAY, DAVID A.J. RICHARDS, AND KATHLEEN M. SULLIVAN

Ms. KAY. Thank you, Senator Biden.

It is a pleasure to be here today at your invitation to discuss with you some of my concerns as a legal scholar about Judge Bork and whether he should be confirmed as a member of the U.S. Supreme Court. At your request, I will be focusing my testimony on his position with respect to the *Griswold* line of cases and what that means about the possibility of his actions if he is confirmed.

Much has been said in this room about Judge Bork's change in his thinking and change of his positions since he has appeared at these confirmation proceedings. On the subject about which I am going to speak, however, Judge Bork has not changed his views one iota in the last 16 years. He took the position in 1971, in his Indiana Law Review article when he first worked out his judicial philosophy. He said that he had a theory of constitutional adjudication which required that the Constitution was to be interpreted according to its text and its history. He gave one example of the courts having failed to follow that mode of reasoning; was the failure exemplified by the *Griswold* line of cases.

He reaffirmed that position in his 1986 San Diego Law Review article. He said there that he adhered to his original intent theory of judicial reasoning, and he again highlighted the *Griswold* case and the cases following it as an example of what the Supreme Court should not do if it were following his position.

In this very room, in his testimony before this committee, he continued to advance both his theory of constitutional adjudication and to make the point that the *Griswold* line of cases was incorrectly reasoned under his theory. He said that the precedents that rested upon *Griswold* had no sound basis in constitutional theory.

Turning to his record as a judge, Judge Bork—sitting on the Court of Appeals for the District of Columbia Circuit, spoke in two cases with respect to the right of privacy. In one case in which he wrote the opinion for the panel, the *Dronenburg* case, Judge Bork criticized the *Griswold* line of cases, interpreted that line of cases very narrowly, and declined to apply that line of cases in the decision for the panel.

Four of his colleagues, in dissenting from the suggestion to rehear the case en banc, said that Judge Bork had failed to follow the Supreme Court's line of precedent in good faith.

In an earlier case, the *Franz* case, in which he wrote a separate opinion, Judge Bork criticized the panel for having used the *Griswold* line of cases and thought that they had applied that line of cases too expansively.

So Judge Bork has been consistent, as a law professor, and as a member of the Court of Appeals for the District of Columbia Circuit, in his view that the *Griswold* line of cases is wrong and should not have a rightful place in constitutional theory.

Now, what are we to conclude from that record as to how Judge Bork would react if he were confirmed as a Justice of the U.S. Supreme Court and were asked to apply the *Griswold* line of reasoning to a new case? This committee has understandably been very concerned about that very matter, and Judge Bork was asked about that precise issue. Under questioning both by Senator Thurmond, Senator Hatch and Senator Heflin, among others, Judge Bork indicated how he would treat a new case resting on the *Griswold* line of reasoning. He said, "First, I would ask the lawyer to tell me whether I could find a generalized right of privacy in the Constitution. And if the lawyer could not do that," he said, "I would then ask whether the lawyer could find a specific basis for whatever right was being asserted."

In the line of questioning by Senator Hatch and Senator Heflin, the discussion focused on the abortion cases, and so Judge Bork asked whether there could be located in the Constitution a specific right to an abortion.

If neither those rights—a general right to privacy or a special right to an abortion—could be found in the Constitution then Judge Bork said, "We would have to look at stare decisis and see whether this precedent is one that should be adhered to, even if wrong; and if not, whether there are institutional reasons for sustaining it."

Judge Bork's view about that suggests that if the case were continually active in producing bad and dangerous precedent, then that was a reason for overruling it. The *Griswold* line of cases is still developing. In Judge Bork's view, it is not a sound line of development. He has, while on the court of appeals, voted to restrict it, and has not voted to expand it. It is my view that if placed on the U.S. Supreme Court he would vote to overrule it, and that would threaten all of our liberties and our rights to privacy. And that causes me great concern, as I know it does members of this committee.

Thank you, Senator Biden.

[The statement of Professor Kay follows:]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
HEARINGS ON THE CONFIRMATION OF JUDGE ROBERT BORK
AS ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

TESTIMONY OF PROFESSOR HERMA HILL KAY
September 29, 1987

Senator Biden, Distinguished Members of the Senate Judiciary Committee: I am Herma Hill Kay, Professor of Law at the University of California, School of Law, Berkeley. I am pleased to be here at your invitation to give you whatever help I can in your discharge of your constitutional duty to give or withhold your consent to the President's nomination of Judge Robert Bork as Associate Justice of the United States Supreme Court. The testimony that I give is, of course, my own and in no way implies any official endorsement of my views by the University of California or the School of Law at Berkeley.

I have taught and written in the areas of family law, marital property, and the conflict of laws since I began my teaching career in 1960. In addition, since 1972 I have taught and written in the area of sex-based discrimination. Constitutional law issues of great importance and complexity arise with some frequency in all of my subject-matter specialties, and I am to that extent also involved in teaching and writing about constitutional law. At your request, I will focus my remarks today on Judge Bork's qualifications to serve on the United States Supreme Court and to participate in that capacity in the decision of constitutional issues affecting the family, privacy, and individual liberties.

I should say at the outset that I have no reason to doubt Judge Bork's personal integrity or his intellectual prowess. Indeed, it is because I take seriously Judge Bork's own statements about the proper role of a judge in constitutional adjudication that I believe he should not be confirmed as a member of the highest court in the land. In spelling out my doubts about Judge Bork's judicial philosophy, I draw on some of the following sources: his published writing, his judicial opinions, his speeches, and his testimony before this Committee as I heard and watched it on radio and television. I did not have access to a full transcript of his testimony as I prepared my own written testimony.

I reject the idea that Judge Bork's law review articles, including one written while he was a professor at Yale, are not relevant to the decision you must make about his qualifications as an Associate Justice on the United States Supreme Court. Those articles, and especially the one entitled, "Neutral Principles and Some First Amendment Problems," published in 1971 in volume 47 of the Indiana Law Journal at pages 1-35, set out a theory of constitutional adjudication that Judge Bork has defended over the years. He reaffirmed the core of that theory in a speech he gave in San Diego in 1985, and which was published in 1986 under the title, "The Constitution, Original Intent, and Economic Rights," in volume 23 of the San Diego Law Review at pages 823-832. He reaffirmed that theory most recently in the open and candid testimony he gave before this Committee last week. Judge Bork's articles, speeches, and confirmation hearing testimony are, I submit, a truer guide to his own judicial philosophy than the cases he participated in as a judge during his tenure on the United States Court of Appeals for the District of Columbia Circuit. That is so because Judge Bork is the sole author of his own articles and speeches, and does not have to qualify or present his ideas in such a way as to attract the support of his colleagues on the bench. Moreover, as a judge on an intermediate appellate court, Judge Bork is constrained by the precedents of a higher authority -- the United States Supreme Court. He and his judicial colleagues on the District of Columbia Circuit are not free to overturn those precedents, even if he might wish to try and persuade them to join him in doing so. Judge Bork has made this very point himself. In Dronenburg v. Zech, 741 F.2d 1388, 1396, and 1396

n. 5 (D.C. Cir. 1984), he wrote in the text of his opinion for the court: "If it is in any degree doubtful that the Supreme Court should freely create new constitutional rights, we think it certain that lower courts should not do so." In footnote 5, he said:

> 5. It may be only candid to say at this point that the author of this opinion, when in academic life, expressed the view that no court should create new constitutional rights; that is, rights must be fairly derived by standard modes of legal interpretation from the text, structure, and history of the Constitution. Or, as it has been aptly put, "the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution. That the complete inference will not be found there -- because the situation is not likely to have been foreseen -- is generally common ground." J. Ely, Democracy and Distrust 2 (1980). These views are, however, completely irrelevant to the functions of a circuit judge. The Supreme Court has decided that it may create new constitutional rights and, as judges of constitutionally inferior courts, we are bound absolutely by that determination. The only questions open for us are whether the Supreme Court has created a right which, fairly defined, covers the case before us or whether the Supreme Court has specified a mode of analysis, a methodology, which, honestly applied, reaches the case we must now decide.

I conclude, based on Judge Bork's written record, both as a law professor and a judge, as well as on his testimony before this Committee, that his theory of how judges should approach constitutional cases is a coherent one that has not essentially changed since 1971. That theory provides an adequate basis for predicting how he is likely to define his own role as a judge on the highest court of the land, once he is freed of the constraints that bind him now as a member of one of the intermediate federal courts of appeal. If he adheres to his own theory of proper judging, the most significant existing constitutional basis for the protection of the right of privacy, which encompasses family privacy, individual liberty and automony, and the emerging right of personal association, will be gravely threatened. Judge Bork, if he is true to his own theory of judging, will surely vote to limit that constitutional basis, known as substantive due process, to its narrowest scope; he will certainly not vote to expand it to encompass new applications; and he may vote to overturn it entirely.

What is Judge Bork's theory of constitutional adjudication? He has stated it most simply himself in the 1986 San Diego article. I paraphrase his position here as follows: The Constitution is law; its words constrain judges in constitutional adjudication; contemporary judges must interpret those words according to the intentions of those who drafted, proposed, and ratified the constitution and its various amendments; lest the document become obsolete, however, judges are not to be limited to apply the constitution only to the circumstances specifically contemplated by the Framers; rather, it is sufficient that the text, structure, and history of the Constitution provide the judge with a major premise; that major premise states a core value that the Framers intended to protect; the judge must then reason from the major premise to supply a minor premise in order to protect the constitutional freedom in contemporary circumstances the Framers could not forsee.

Judge Bork gives two examples of how this theory of constitutional adjudication (which he calls "intentionalism" or "interpretivism") works in permitting judges to translate the core values of the constitution to modern times. One example, has to do with technological change. Thus, he says, "[w]e are able to apply the first amendment's Free Press Clause to the electronic media and to the changing impact of libel litigation upon all the media; we are able to apply the fourth amendment's prohibition on unreasonable searches and seizures to electronic surveillance; we apply the Commerce Clause to state regulations of interstate trucking." (Bork, The Constitution, Original Intent, and Economic Rights, 23 San Diego L. Rev. 823, 826 (1986)).

The second example has to do with changing notions of family intimacy and individual sexual autonomy. Our attitudes about the proper roles of men and women in society, the functions entrusted by the society to the family, and the autonomy of individual aspirations beyond the family have been transformed by technological change and economic progress as surely as our understanding of free speech has been altered by the development of electronic eavesdropping devices. Yet Judge Bork does not approve of the Supreme Court's method of deriving a constitutional right of privacy that protects the emerging social consensus supporting family autonomy and individual freedom in decisions affecting family intimacy. He rejects that method because he believes that the Court has chosen to draw a broader and more generalized right of privacy from the specific provisions of the Bill of Rights than the words, structure, and history of the Bill of Rights will support. In his view, if the Constitution is silent on the subject of a generalized doctrine of family privacy and individual autonomy, the judge must accept the choice made by the elected representatives of the governing majority to condemn certain sexual practices. "That result follows," he says, "from the principle of acceptance of democratic choice where the Constitution is silent." (Bork, id., 23 San Diego L. Rev. at 828.)

In continuing his analysis, Judge Bork notes that he is not arguing that any of the privacy cases were wrongly decided; rather his point is that "the level of abstraction chosen makes the application of a generalized right of privacy unpredictable." (Bork, id., 23 San Diego L. Rev. at 829.) In like fashion, I will not argue today that the privacy cases were rightly decided. Rather, I will show that the logic of Judge Bork's position will require him, as an Associate Justice of the Supreme Court, to repudiate a method of reasoning that has enabled that Court to preserve the Constitution both as a contemporary statement of the Supreme Law of the land and as an evolving repository of the fundamental freedoms of the American people.

Judge Bork identifies, both in his 1986 San Diego Law Review article and in his 1971 Indiana Law Review article, the case of Griswold v. Connecticut, 381 U.S. 479 (1965), as a clear example of impermissible judicial reasoning that violates his theory of constitutional adjudication. In his testimony before this Committee, he referred to Justice Douglas's reasoning in that case as "pernicious." Griswold involved a challenge on behalf of married couples to a Connecticut statute dating back to 1879 that prohibited "any person" from using contraceptive devices for the purpose of preventing conception. A majority of the Supreme Court invalidated the statute as an impermissible invasion of the constitutional right of married persons to determine for themselves both the size of their families and the manner of their sexual intimacy. Griswold builds a constitutional wall of privacy around the marital bedroom, and forbids the state from limiting marital intimacy to procreation.

Five members of the Griswold Court drew this constitutional right of marital privacy from an analysis of the specific guarantees of freedom contained in several provisions of the Bill of Rights: the right of association in the First Amendment; the prohibition against quartering of soldiers in any house contained in the Third Amendment; the protection against unreasonable searchs and seizures provided in the Fourth Amendment; the protection against self-incrimination contained in the Fifth Amendment; and the reservation of rights to the people in the Ninth Amendment. Justice Douglas drew on earlier Supreme Court decisions for the proposition that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." He went on to conclude that the marital relationship lies "within the zone of privacy created by several fundamental constitutional guarantees." (Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965)).

Justice Goldberg, concurring, accepted for himself and for Justices Brennan and Chief Justice Warren the analysis provided by Justice Douglas, but stressed the significance he found in the Ninth Amendment to the Court's conclusion. Justices Harlan and White, in separate concurrences, preferred to rest the decision on the protection of "liberty" contained in the due process clause of the 14th Amendment, without regard to the Bill of Rights. Justices Black and Stewart, in separate dissenting opinions, expressed their belief that the Connecticut statute must be upheld because no constitutional right of privacy could be located in the specific text of the document.

Judge Bork's criticism of the Griswold reasoning is directed primarily at Justice Douglas's opinion. His chief objection, set out in concise form in the San Diego Law Review article, is that Douglas generalized the specific protections contained in particular provisions of the Bill of Rights into an overall right of privacy that applies even where none of the specific provisions apply. He concludes:

> By choosing that level of abstraction, the Bill of Rights was expanded beyond the known intentions of the Framers. Since there is no constitutional text or history to define the right, privacy becomes an unstructured source of judicial power.

(Bork, id., 23 San Diego L. Rev. at 828-29.) Judge Bork offered a fuller criticism of Justice Douglas's opinion in his earlier Indiana article. He said there:

> The Griswold opinion fails every test of neutrality. The derivation of the principle was utterly specious, and so was its definition. In fact, we are left with no idea of what the principle really forbids. Derivation and definition are interrelated here. Justice Douglas called the amendments and their penumbras "zones of privacy," though of course they are not that at all. They protect both private and public behavior and so would more properly be labelled "zones of freedom." If we follow Justice Douglas in his next step, these zones would then add up to an independent right of freedom, which is to say, a general constitutional right to be free of legal coercion, a manifest impossibility in any imaginable society.
>
> Griswold, then, is an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it. We are left with no idea of the sweep of the right of privacy and hence no notion of the cases to which it may or may not be applied in the future. The

> truth is that the Court could not reach its result in Griswold through principle. The reason is obvious. Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups. When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the respective claims to pleasure. Compare the facts in Griswold with a hypothetical suit by an electric utility company and one of its customers to void a smoke pollution ordinance as unconstitutional. The cases are identical.

Bork, 47 Indiana L. Rev. at 9. In his testimony before this Committee, Judge Bork called Justice Douglas's opinion more of a "metaphor" than a reasoned analysis of the Constitution. He has repeatedly condemned the concept of substantive due process as a "pernicious" doctrine. Yet Justice Douglas did not rely upon the specific provisions of the Bill of Rights to create the right of marital privacy. Indeed, in the closing paragraph of his opinion, he stated that "[w]e deal with a right of privacy older than the Bill of Rights--older than our political parties, older than our school system." As the remaining sentences of that concluding paragraph show, Justice Douglas drew the concept of marital privacy from the very nature of marriage itself:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet is is an association for as noble a purpose as any involved in our prior decisions.

Griswold v. Connecticut, 381 U.S. 479, 486 (1965). What Justice Douglas did was to hold that the protections of individual autonomy guaranteed by the words of several provisions of the Bill of Rights created a broader protection for the scope of individual self-determination than their specific content would suggest. The spirit, or (to use Douglas's word), the "penumbras" emanating from these specific provisions of the Bill of Rigrts, when incorporated by the due process clause of the Fourteenth Amendment, limit the power of the state legislatures to impair the privacy that is inherent in the marriage relationship.

Contrary to Judge Bork's view, the statement of such a principle does not create a new and undefined constitutional right. Rather, it recognizes that the essential nature of a basic social institution -- marriage -- cannot be maintained without protection against state regulation that deprives its members of the freedom of intimate association in the same way that the specific provisions of the Bill of Rights cited, when incorporated into the Due Process Clause, protect other similar personal freedoms against state regulation.

Justice Goldberg forcefully demonstrated in his concurring opinion in Griswold that the refusal to entertain the possibility that the Constitution protects the family against even extreme state regulation would lead to absurd results. He gave an example of what he meant. He said, "[s]urely the Government, absent a showing of compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them." Yet, he went on to point out, by the reasoning of the two dissenters in Griswold, (Justices Hugo Black and Potter Stewart), [and I would add, by the logic of Judge Bork's theory of constitutional adjudication as well], ". . . such an invasion of marital privacy would not be subject to constitutional challenge because . . . no provision of the Constitution specifically prevents the Government from curtailing the marital right to bear children and raise a family." (381 U.S. at 496-97; concurring opinion of Justice Goldberg.)

Contrary to Judge Bork's view of the right to privacy cases, I do not believe that they represent an unprincipled and unpredictable usurpation of legislative power by the Supreme Court. Analyzing these cases as they stood in 1980, the editors of the Harvard Law Review thus described the Court's methodology:

> Briefly put, the Court has sought to identify those areas of human activity in which individual free choice is so rooted in the "traditions and [collective] conscience of our people" that

> substantial intrusion would disturb the proper balance between liberty and the demands of organized society.

Developments in the Law: The Constitution and the Family, 93 Harvard Law Review 1156, 1177-78 (1980) (footnote omitted). The editors go on to discuss the Court's use of tradition as the basis for identification of fundamental values and its insistence that those values have contemporary validity in order to gain constitutional protection.

It is important to recognize how basic those protected fundamental rights are to our contemporary concept of a free society. Without attempting to discuss specific cases, or to justify in each case the Court's result, we can note that the Court's method of reasoning has identified the following, among others, as constitutionally protected family rights: the right to marry without regard to racial restrictions [Loving v. Virginia, 388 U.S. 1 (1967)] or financial limitations [Zablocki v. Redhail, 434 U.S. 374 (1978)]; the right to determine one's procreation [Skinner v. Oklahoma, 316 U.S. 535 (1942); the right to control one's fertility through the use of contraception [Carey v. Population Services International, 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965)] and abortion [Roe v. Wade, 410 U.S. 113 (1973)]; the right to maintain extended family relationships [Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion)]; and the right to rear and educate one's children [Lassiter v. Department of Social Services, 452 U.S. 18 (1981); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923)]. Although the specific constitutional basis for the recognition of these fundamental rights has varied, the Court over the years has come to rest many of them in the due process clause of the Fourteenth Amendment. These are some of the freedoms protected by the Court's continuing development of the doctrine of "substantive" (as opposed to "procedural") due process.

Judge Bork has been especially critical of the substantive due process cases. His criticism is understandable, given his interpretivist approach to the Constitution. Several years ago, the editors of the Harvard Law Review thus explained the objections of interpretivists to the doctrine of substantive due process:

> There are different schools of interpretivist thought. Some interpretivists argue that the Constitution should be read in its historical context, staying as close as possible to the exact meaning that the Framers would have given constitutional provisions. This approach purports to minimize the tensions inherent in judicial review by limiting courts to effectuation of the ascertainable intent of the Framers. . . At this late date, however, adoption of this approach would require a massive abandonment of precedent. Decisions enforcing the guarantees of the Bill of Rights in situations where the Framers would not are irreconcilable with "historical" interpretivism. Concentrating on the precise views of the Framers would rob the Constitution of its capacity to respond to the changing threats to liberty presented by an increasingly powerful government. It is not surprising that even the leading modern exponent of interpretivist philosophy on the Court, Justice Black, did not subscribe to it.
>
> Most interpretivists look through the text to its underlying purposes, but insist that only those values that "the Constitution marks as special" may form the basis of constitutional decisions. This more expansive brand of interpretivism seeks legitimacy, not in the claim that prior political decisions dictate the answer to particular constitutional questions, but in the fact that the Framers identified certain broad values -- such as free speech or protection from unreasonable searches -- as constitutionally significant. While judges need not look solely to history to determine what a particular provision means, judicial interference must be limited, according to this view, to those areas of concern identified by plain constitutional language. Insufficiently explicit provisions such as the due process and equal protection clauses are not to be used to justify the enforcement of rights not enumerated in the text. Courts are not authorized "to roam at large in the broad expanses of policy and morals."

The Constitution and the Family, 93 Harvard Law Review at 1169-71 (footnotes omitted). Judge Bork's brand of interpretivism (which he calls "intentionalism") is closer to the second approach described by the Harvard editors than to the first. In his 1986 San Diego Law Review article, he wrote:

> It is important to be plain at the outset what intentionalism means. It is not the notion that judges may apply a constitutional provision only to circumstances specifically contemplated by the Framers. In such a narrow form the philosophy is useless. Because we cannot know how the Framers would vote on specific cases today, in a very different world from the one they knew, no intentionalist of any sophistication employs the narrow version just described.
>
> There is a version that is adequate to the task. Dean John Hart Ely has described it:
>
> > What distinguishes interpretivism [or intentionalism] from its opposite is its insistence that the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution. That the complete inference will not be found there -- because the situation is not likely to have been foreseen -- is generally common ground.
>
> In short, all an intentionalist requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a major premise. That premise states a core value that the Framers intended to protect. The intentionalist judge must then supply the minor premise in order to protect the constitutional freedom in circumstances the Framers could not have foreseen.

Bork, 23 San Diego Law Review at 826 (footnotes omitted). This position may seem to be a reasonable one. But, as the Harvard Law Review editors point out, its adoption would also change the course of constitutional interpretation:

> Contemporary adoption of this approach would also require a significant abandonment of constitutional precedent. In its application of the Bill of Rights to the states, the Court has rejected Justice Black's position that the framers of the fourteenth amendment intended "total incorporation" of the first eight amendments and has rested squarely on the view that the due process clause has independent substantive content. This result could not be defended by either interpretivist mode.

The Constitution and the Family, 93 Harvard Law Review at 1171 (footnotes omitted).

Would Judge Bork, if confirmed as an Associate Justice of the United States Supreme Court, follow the tenets of his intentionalist theory and seek to persuade his fellow Justices to reject the substantive due process cases? I cannot rule out the strong possibility that he would do just that. There is some confirmation of that possibility in one of his opinions for the Court of Appeals for the District of Columbia Circuit.

In Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), James L. Dronenburg appealed from a district court decision upholding the United States Navy's action administratively discharging him for homosexual conduct. Dronenburg invoked the right of privacy established in Griswold and spelled out in later United States Supreme Court decisions as one basis for reversal. Judge Bork, writing for a panel composed of himself, then-Judge Scalia, and District Court Judge Williams of the Central District of California sitting by designation, affirmed the district court and rejected Dronenburg's constitutional claims.

I do not discuss here whether Dronenburg was correctly decided. Rather, I want to focus on Judge Bork's method of handling the Supreme Court's substantive due process cases in his Dronenburg opinion. I believe that he read those cases as narrowly as possible, confining them strictly to their facts, in order to avoid a decision that his judicial philosophy would condemn as not grounded in the constitutional text. It does not detract from my point that a bare five-to-four majority of the United States Supreme Court subsequently confirmed in Bowers v. Hardwick, 106 S.Ct. 2841 (1986), that the Griswold line of cases should not be read to extend the right of privacy to protect private consensual homosexual intimacy. My criticism goes beyond the outcome of either decision. It is that Judge Bork made clear in his use of the Supreme Court precedents in Dronenburg that he was not in sympathy with the Court's substantive due process cases and that he would restrict them as narrowly as possible. He showed himself willing, in other words, to act in his capacity as a Judge in accordance with the constitutional theory he had propounded as a law professor.

Here is what Judge Bork said about the Supreme Court's substantive due process cases establishing the right of privacy in his opinion in *Dronenburg*:

> These cases, and the suggestion that we apply them to protect homosexual conduct in the Navy, pose a peculiar jurisprudential problem. When the Supreme Court decides cases under a specific provision or amendment to the Constitution it explicates the meaning and suggests the contours of a value already stated in the document or implied by the Constitution's structure and history. The lower court judge finds in the Supreme Court's reasoning about those legal materials, as well as in the materials themselves, guidance for applying the provision or amendment to a new situation. But when the Court creates new rights, as some Justices who have engaged in the process state that they have done, *see, e.g.,* *Doe v. Bolton,* 410 U.S. 179, 221-22 (1973) (White J., dissenting); *Roe v. Wade,* 410 U.S.113, 167-68 (1973) (Stewart, J., concurring), lower courts have none of these materials available and can look only to what the Supreme Court has stated to be the principle involved.
>
> In this group of cases, and in those cited in the quoted language from the Court's opinions, we do not find any principle articulated even approaching in breadth that which appellant seeks to have us adopt. The Court has listed as illustrative of the right of privacy such matters as activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. It need hardly be said that none of these covers a right to homosexual people and their elected representatives, not through the ukase of this court.

Dronenburg v. Zech, 741 F.2d 1388, 1395-97 (1984) (footnote omitted).

Five of Judge Bork's colleagues on the Court of Appeals voted for rehearing *en banc*. In their dissent from the denial of a suggestion to hear the case *en banc*, they denounced the panel's failure to apply the Supreme Court precedents it cited. After criticizing the panel's "wholly unnecessary" and "extravagant exegesis on the constitutional right of privacy," they went on to say:

> We object most strongly, however, not to what the panel opinion does, but to what it fails to do. No matter what else the opinions of an intermediate court may properly include, certainly they must still apply federal law as articulated by the Supreme Court, and they must apply it in good faith. The decisions of that Court make

> clear that the constitutional right of privacy, whatever its genesis, is by now firmly established. An intermediate judge may regret its presence, but he or she must apply it diligently. The panel opinion simply does not do so. Instead of conscientiously attempting to discern the principles underlying the Supreme Court's privacy decisions, the panel has in effect thrown up their hands and decided to confine those decisions to their facts. Such an approach to "interpretation" is as clear an abdication of judicial responsibility as would be a decision upholding all privacy claims the Supreme Court had not expressly rejected.

Dronenburg v. Zech, 746 F.2d 1579, 1580 (D.C. Cir. 1984) (dissenting opinion of Chief Judge Robinson, dissenting from denial of suggestion to hear case _en banc_).

Would Judge Bork, if confirmed as Associate Justice Bork, vote to reject the reasoning used in _Griswold_ and its progeny? Would he vote to overrule some of the specific decisions that now rest on that substantive due process reasoning, such as Roe v. Wade? Under questioning from members of this Committee, Judge Bork properly declined to discuss specific cases, but he offered a description of the method he would use if asked to follow a Supreme Court precedent he found questionable.

Under questioning from Senator Hatch on Tuesday, September 15, 1987, with respect to a new case raising an issue similar to that in Roe v. Wade, Judge Bork responded as follows:

> If that case or something like it came up, and if the case called for a broad up or down, which it may not, I would first ask the lawyer who wants to support the right, "Can you derive a right to privacy not to be found in one of the specific amendments in some principled fashion from the Constitution so I know not only where you got it but what it covers."
>
> There are rights not specifically mentioned in the Constitution, like the right to travel. You know, it's conceivable he could do that. I

> don't know. If he could not do that, I would say, "Well, if you can't derive a general right of privacy, can you derive a right to an abortion, or, at least to a limitation upon anti-abortion statutes, legitimately from the Constitution?
>
> If after argument that didn't sound like it was going to be a viable theory, I would say to him, "I would like you to argue whether this is the kind of case that should not be overruled." Because, obviously, there are cases we look back on and say they were erroneous or they were not compatible with original intent, but we don't overrule them for a variety of reasons."

Transcript, September 15, 1987, Afternoon Session, at pp. 232-33.

The following day, September 16, 1987, under questioning from Senator Heflin, Judge Bork spelled out more fully the kind of argument that might be made concerning a specific right to an abortion:

> "Well it seems to me, Senator, that it would be easier to argue a right to an abortion. I am not saying it would work, but it would be easier to do that than it would be to find this generalized right of privacy. For example, I understand groups are working -- I have not seen their work product, but I am told groups are working on that. For example, some groups, I think, are trying an equal protection argument.
>
> Only women have this specific burden, and forcing a woman to carry a baby to term -- some of the groups are trying, I suppose, is a form of gender discrimination."

Transcript, September 16, 1987, Afternoon Session, at pp. 160-61.

Later during that same exchange with Senator Heflin, Judge Bork spelled out his general attitude toward stare decisis, making clear, however, that he was not linking his discussion to any particular Supreme Court case:

> All right. I think it has to be, in the first place, clear that the prior decision was erroneous. I mean, not just shaky, but really wrong in terms of constitutional theory, constitutional principle. But that is not sufficient to overrule. I have discussed those factors before, but I will mention them again, and a number of factors counsel against overruling. For example, the development of private expectations on the part of the citizenry. Is this an internalized belief and a right? The growth of institutions, governmental institutions, private institutions, around a ruling.
>
> * * *
>
> The need for continuity and stability in the law, which is certainly always a factor to be weighed. The need for predictability in legal doctrine. I think the preservation of confidence in the Court by not saying that this crowd just does whatever they feel like as the personnel changes. And the respect due to the judgment of predecessors on a legal issue, if they have explained their judgment.
>
> Now, of course, against that is if it is wrong, and secondly, whether it is a dynamic force so that it continues to produce wrong and unfortunate decisions.
>
> * * *
>
> That is the kind of thing you have to weigh and

> that is a very fact-based consideration, a very particularistic consideration about whether this is the kind of case that goes one way or the other. I think the court has got to work out a better theory of stare decisis than it has now articulated.

Transcript, September 16, 1987, Afternoon Session, at pp. 162-65.

Finally, Judge Bork indicated on several occasions during these Confirmation Hearings that he shared the commonly accepted view that the Supreme Court should be more willing to reexamine its constitutional precedents than its cases construing statutes. This is because, in the absence of a constitutional amendment, only the Court can correct its prior constitutional interpretations, while Congress or the state legislatures can change the Court's statutory interpretations by subsequent amendment.

How should this Committee evaluate Judge Bork's approach to the Griswold line of cases in light of his testimony quoted above? Professor Laurence Tribe, during his appearance before this Committee, asked how plausible it is to believe that some future lawyer arguing before the Court will be able to construct an entirely new constitutional argument, satisfactory to Judge Bork, that would support a general right to privacy. I share his concern, and doubt whether that alternative is feasible. Nor do I place much hope in Judge Bork's being persuaded by the efforts of some groups to bring the specific right to choose whether to have an abortion within the coverage of the Equal Protection Clause of the Fourteenth Amendment. Professor Tribe's testimony should lead this Committee to question whether Judge Bork's approach to the Equal Protection Clause as it applies to women is a predictable, principled one. I believe Professor Tribe characterized it as a request for a "blank check." We are left, then, with Judge Bork's approach to stare decisis as a protection of the basic right to privacy. It is clear that he thinks

Griswold was wrongly decided. It is undeniable that this line of cases is still developing. I can only conclude that Judge Bork would find Griswold the kind of dynamic precedent that continues to produce bad law. I question whether he would find that these cases should be left standing in the name of private expectations or public institutional stability. His present attitude toward these cases is disclosed by his reasoning in Dronenburg. I believe it is clear that Judge Bork's constitutional theory endangers the Griswold line of cases.

I would like to make one final point in conclusion. Several times during these hearings witnesses have referred to Judge Bork's insensitivity to the concerns of women. I think his treatment of the facts of the Griswold case itself is an excellent example of that insensitivity. He has dismissed the Connecticut law prohibiting the use of contraceptives as a "nutty" law, and has argued that, as a practical matter, it could not have been enforced. He derided Justice Douglas's suggestion that police might actually invade the "sacred precincts of marital bedrooms" to search "for telltale signs of the use of contraceptives," because such searches would be prohibited by the Fourth Amendment. What Judge Bork did not acknowledge, but what must certainly have been common knowledge in Connecticut during the time this law was in effect, was the inhibition the law placed on women seeking medical advice. Women who needed to control their fertility for economic or medical reasons were literally forced to ask their physicians to commit a crime by asking them to prescribe contraceptives. Moreover, this law deprived poor women who could not afford to consult private physicians of access to public clinics. Harriet Pilpel's letter to Senator Biden on behalf of herself and Catherine G. Roraback dated September 16, 1987, makes that point forcefully. Ms. Pilpel has represented the Planned Parenthood Federation of America since before 1940, and Ms. Roraback has represented the Planned Parenthood League of Connecticut since 1955. Ms. Pilpel told this Committee that, following the 1940 Connecticut case of State v. Nelson, 126 Conn. 412, 11 A.2d 856 (1940) which upheld the Connecticut contraceptive statute until the decision in Griswold in 1965, "the nine Planned Parenthood clinics which had been providing contraceptive services until then were closed and remained closed. . .". Any judge who ignores the repressive impact of the Connecticut law upon Connecticut women, whose health and, in some cases, whose very lives depended on limiting their fertility is indeed insensitive to the concerns of women. When you, as members of this Committee, add Judge Bork's insensitivity shown in his attitude toward the Griswold case to his insensitivity to the rights of minority groups that other witnesses have documented before you, I hope you will conclude that his nomination does not deserve your support.

The **Chairman**. Thank you very much, Professor.

Professor Richards.

TESTIMONY OF DAVID A.J. RICHARDS

Mr. **Richards**. Senator, I have submitted a longer written statement which I will briefly summarize.

The **Chairman**. The entire statement will be placed in the record, Professor.

Mr. **Richards**. The nomination of Robert Bork has raised in the mind of the nation the most compelling issues of interpretive philosophy, issues that absorb not only Justices of the Supreme Court and lawyers, but all Americans as a free people under the rule of law.

Judge Bork's critical views on the very inference of the constitutional right to privacy are at the core of his interpretive philosophy. His views on constitutional privacy are extreme and quite undefended, I will argue, against a great weight of contrary argument and authority. His arguments raise reasonable doubts about whether he understands the traditional role of the judiciary in the vigilant protection of the inalienable rights of a free people. The protection of rights cannot reasonably or responsibly be left to any such doubt.

My remarks address the interpretive proposition defended, by Bork for the last 15 years, that the constitutional right to privacy was improperly inferred from the Constitution. Bork's attack on its inference fails on each of the grounds he specifies: text, history, democratic political theory, and judicial reasoning and role.

First, the text of the Constitution, of course, expressly addresses the question of unenumerated rights and leaves us in absolutely no doubt that such rights exist and are as fully protected as enumerated rights; to wit, the ninth amendment.

Second, the history of the drafting and ratification of the U.S. Constitution and Bill of Rights could not, I think, be clearer. The founders meant textual guarantees of unenumerated rights to be taken seriously. Indeed, agreement that unenumerated rights are fully protected is at the very center of the constitutional compact and, indeed, rests on the deepest convictions among the founders about the point of a written Constitution; namely, rights are not given by the Constitution but the Constitution's authority rests on its respect for, its protection of the inalienable rights of free people made in the image of a just God.

A little pertinent background history is relevant here. Many of the leading founders had expressly argued that the 1787 Constitution properly lacked any full Bill of Rights because textual guarantees of such rights would wrongly be taken to justify the malign inference that no other rights were protected by the Constitution. James Iredell, later a Justice of the Supreme Court of the United States, made this point at the North Carolina ratifying convention with great force when he argued that a Bill of Rights would be, in his words, "a snare rather than a protection."

Iredell argued, and I quote, "A Bill of Rights as I conceive would not only be incongruous but dangerous, for no man, his ingenuity be what it will, could enumerate all the individual rights not relinquished by the Constitution."

Iredell vividly describes and condemns precisely a perverse originalism like Judge Bork's that would anachronistically limit the protection of rights to those enumerated rights protected in 1787 or 1791.

Americans, of course, nonetheless demanded a Bill of Rights, and several states ratified only on the understanding that a Bill of Rights would shortly be added. The answer to the dreaded negative inference was expressly to negative any such inference by the ninth amendment. The Bill of Rights was drafted and ratified on that understanding, and the ninth amendment is at the core of that constitutional consensus; namely, all inalienable rights, enumerated and unenumerated, are reserved from State power. Iredell's malign inference is expressly rebutted by the ninth amendment.

Third, the political theory of the American Constitution rests on the premise of constitutionally guaranteed independent centers of self-government, not only federalism and the separation of powers but private spheres of inalienable human rights. For the founders, such inalienable rights included not only enumerated rights, like freedom of conscience and speech, but unenumerated rights protecting, among other things, the sphere of associational liberty associated with marital intimacy.

The historical materials are quite clear. The founders assumed an unenumerated right to companionate marriage, a voluntarily formed association of intimate friendship and love through which persons realize the complementary fulfillment of essential needs for sustaining enduring personal and ethical value in living a complete life, including having and rearing children. The State may coercively abridge this right only on the same terms it may abridge any other fundamental right of a free people; namely, the abridgment is justified to protect compelling secular state interests.

There would, thus, on this ground be no objection to the application of neutral criminal statutes to intrafamilial murders, wife-or husband-beatings or child abuse, no matter how rooted in intimate family life.

Fourth, we in America, I believe, look to the judiciary to vindicate on terms of principle the inalienable rights to which Americans are entitled, and the judiciary has, as a matter of sound interpretive principle and role, elaborated the original understanding to protect unenumerated rights in general, and the right to marriage in particular. The Supreme Court properly infers this constitutional right in *Griswold* because Connecticut's brutal and callous manipulation of marital sexuality—married couples could neither buy nor use contraceptives—inhibits one of the decisions central to companionate marriage: whether and when one will have offspring. Anti-contraception laws——

Senator THURMOND. I do not want to interrupt, but your time is up. You are confined to 5 minutes, and if you go, the rest of them are going to go. Your statement will go in the record.

Mr. RICHARDS. Thank you, Senator. I will finish in a moment.

Anti-contraception laws could not satisfy this burden of justification.

The idea that unenumerated rights are foreign to the Constitution distinguished neither liberal nor conservative jurisprudence. It is an idea foreign, I think, to the text, the history, the political theory, and the continuous judicial tradition of American public law as seen in Justice Harlan's brilliant concurring opinion in *Griswold*.

It is in the worst sense a radical idea outside the deep consensus on values of Americans as free people under the rule of law, and it is supremely paradoxical that such a claim should be sponsored by any idea of founders' intent. For any reasonable reading of founders' intent is quite clear: unenumerated rights are to be fully protected.

The **Chairman**. Would you please summarize in the next 30 seconds?

Mr. **Richards**. We have the right, I think, to demand more of Justices of the Supreme Court than a rigid interpretive attitude, like Judge Bork's, that against the weight of so much argument and authority can so playfully dismiss unenumerated rights as enduring values of American constitutionalism.

Robert Bork's interpretive philosophy illustrates, as I earlier suggested, one of the founders' fears: He is Iredell's nightmare, an interpreter who would, in defiance of the ninth amendment, anachronistically betray the central premise of our constitutionalism, the protection on fair terms of all our rights. We need as a people to recapture our constitutional heritage of rights under the rule of law and, I submit, to demand of ourselves and certainly of our judges understanding of and respect for this great, this beloved tradition.

Thank you.

[The statement of Professor Richards follows:]

TESTIMONY

PROFESSOR DAVID A.J. RICHARDS

HEARINGS ON THE NOMINATION OF ROBERT H. BORK
TO BE ASSOCIATE JUSTICE OF THE
UNITED STATES SUPREME COURT
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY
SEPTEMBER 29, 1987

CONSTITUTIONAL PRIVACY AND UNENUMERATED RIGHTS

I am David Richards, professor of law at New York University; I teach constitutional law and am the author of various books and articles on constitutional law and interpretation, including a study of the American doctrine of religious liberty, free speech, and constitutional privacy (Toleration and the Constitution (New York: Oxford University Press, 1986)). I am happy to give the Senate Judiciary Committee my views on the central place of constitutional privacy in the American constitutional tradition.

The nomination of Robert Bork has raised in the mind of the nation the most compelling issues of interpretive philosophy, issues that absorb not only justices of the Supreme Court and lawyers but all Americans as a free people under the rule of law. Judge Bork's critical views on the very inference of the constitutional right to privacy are at the core of his interpretive philosophy. His views on constitutional privacy are extreme and quite undefended against a great weight of contrary argument and authority. His arguments raise, so I shall argue, reasonable doubts about whether he understands the traditional role of the judiciary in the vigilant protection of inalienable rights of a free people. The protection of rights cannot reasonably or responsibly be left to any such doubt.

My remarks address the interpretive proposition, defended by Robert Bork[1], that the constitutional right to privacy was improperly inferred from the Constitution, because its inference lacks adequate support in text, history, democratic political theory, and sound judicial reasoning. I examine Bork's argument in the way any self-respecting scholar examines any argument by a fellow scholar: as an expression of conscientious interpretive convictions, meant seriously and to be taken seriously. So understood, Bork's attack on the inference of constitutional privacy fails on each of the grounds he specifies: text, history, democratic political theory, and judicial reasoning and role.

1. Text and History: Unenumerated Rights and the

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[1] See Robert H. Bork, "Neutral Principles and Some First Amendment Problems", 47 Ind. L.J. 1, 7-11 (1971)

The Constitution of 1787 and the Bill of Rights of 1791 form a constitutional unit, because the ratification of the one was--in the view of leading ratifying states like Massachusetts, Virginia, and New York--premissed on the promise of the ratification of the other. These founding documents of American constitutionalism were deemed acceptable not because they exhausted the protection of basic rights but precisely because--in the view of the Founders--they expressly protected unenumerated rights as well. Indeed, agreement that unenumerated rights are fully protected is at the very center of the constitutional compact, and indeed rests on the deepest convictions of the Founders about the point of a written constitution, namely, that rights are not given by the Constitution, but that the Constitution's authority rests on its respect for and protection of the inalienable rights that persons have as free and rational persons made in the image of a just God.

One of the most important and cogent challenges of the anti-federalists to the 1787 Constitution was its lack of a Bill of Rights[2]. The standard answer to this objection in the ratification debates over the 1787 Constitution was made by leading Founders like Wilson[3] and Madison[4] at their respective constitutional conventions (Pennsylvania and Virginia) and by Hamilton in Federalist Papers[5], namely, that the theory of the 1787 Constitution was--in contrast to that of the British Constitution--foundationally republican (*i.e.*, contractarian): any powers not expressly granted to the federal constitution were reserved to the people, including the wide range of inalienable human rights that could not, in principle, be surrendered to the state. Indeed, a Bill of Rights was, on this view, a snare to the protection of such inalienable human rights, for the express protection of certain rights would justify the inference that rights not expressly protected were now subject to the illimitable power of the federal Leviathan; in effect, any gain in protection of rights from a Bill of Rights would be lost by this negative inference. A number of ratifying states were, however, very much concerned at the absence of a Bill of Rights, and ratified on the recommendatory understanding that a Bill of Rights would shortly be added to the 1787 Constitution by the amendment procedure specified in the

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[2] Federalist Farmer, one of the best of the anti-federalist tracts, puts the argument with particular force. See, e.g., pp. 56-9, 79-86, Herbert J. Storing, ed., The Anti-Federalist (1985).

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[3] See, e.g., pp. 388, 470-1, Merrill Jensen, ed., Documentary History of the Ratification of the Constitution, vol. II (1976).

[4] See, e.g., pp. 620, 626-7, Jonathan Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution, vol. III (1836).

[5] No. 84, Federalist Papers (J.E. Cooke ed. 1961).

Constitution, including a general provision that there should be no negative inference from the express protection of certain rights that unenumerated rights are not also protected[6]. The consequence of this debate is, of course, the first ten amendments to the 1787 Constitution, namely, the 1791 Bill of Rights, including, as they do, the Ninth Amendment, which expressly rebuts the negative inference so feared by many Founders[7]. Any interpretive understanding of the protection of basic rights in the 1787 Constitution and 1791 Bill of Rights must include protection of unenumerated rights as well. Indeed, the ratification debates and relevant texts could not be clearer that all these rights are *textually* protected[8]. The idea that these rights are "non-textual" is neither a historically nor a textually sustainable claim; it is one of the remarkable facts about contemporary views of constitutional interpretation that this claim should be so uncritically espoused, especially by theorists allegedly concerned by fidelity to Founders' intent[9]. On any plausible theory of Founders' intent, such intent could not be clearer that such unenumerated rights are fully protected by the Constitution.

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[6] For general studies of the call of ratifying conventions for a bill of rights, see Bernard Schwartz, *The Great Rights of Mankind* 119-159 (1977); Robert A. Rutland, *The Birth of the Bill of Rights 1776-1791* (rev. ed. 1983) . See, also, the Massachusetts' recommendations, pp. 177-8, Jonathan Elliot, *op. cit.*, vol. II; and Virginia's recommendations, pp. 657-661, *id.*, vol. III.

[7] See, e.g., pp. 165-8, 177, 199-200, Bernard Schwartz, *The Great Rights of Mankind* (1977); pp. 34-41, 22-30, John Hart Ely, *Democracy and Distrust* (1980).

[8] *Cf*. John Hart Ely, *Democracy and Distrust* 34-41, 22-30 (1980) (noting that in addition to Ninth Amendment, textual support for unenumerated rights can be found in privileges and immunities clause of article IV and in privileges and immunities and due process clauses of Fourteenth Amendment).

We need interpretively to recapture the great worries about the very legitimacy of constitutional government that surrounded these debates about the usefulness of a Bill of Rights and the role of textual guarantees of unenumerated rights in the principled resolution of these worries.

For purposes of the present argument, there is no more extraordinarily prophetic expression of the fears of Founders about a Bill of Rights not interpreted in a way hospitable to unenumerated rights as well than Iredell's argument at the North Carolina ratifying convention:

> "A bill of rights, as I conceive, would not only be incongruous, but dangerous. No man, let his ingenuity be what it will, could enumerate all the individual rights not relinquished by this Constitution. Suppose, therefore, an enumeration of a great many, but an omission of some, and that,

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[9] In fact, there is good reason to believe that the Founders would have repudiated any narrow construction of Founders' intent of the sort often now urged. See, e.g., H. Jefferson Powell, "The Original Understanding of Original Intent", 98 Harv. L. Rev. 885 (1985).

> long after all traces of our present disputes were at an end, any of the omitted rights should be invaded, and the invasion complained of; what would be the plausible answer of the government to such a complaint? Would they not naturally say, 'We live at a great distance from the time when this Constitution was established. We can judge of it much better by the ideas of it entertained at the time, than by any ideas of our own. The bill of rights, passed at that time, showed that the people did not think every power retained which was not given, else this bill of rights was not only useless, but absurd. But we are not at liberty to charge an absurdity upon our ancestors, who have given such strong proofs of their good sense, as well as their attachment to a liberty. So long as the rights enumerated in the bill of rights remain unviolated, you have no reason to complain. This is not one of them.' Thus a bill of rights might operate as a snare rather than a protection."[10]

That dire prophecy applies, a fortiori, to an interpretive style today, like Judge Bork's, that disabled us from elaborating reasonable arguments of principle that would, in effect, read out of the written constitution both the understanding and text addressed to this fear, intended precisely to insure the continuing protection of basic rights--both enumerated and unenumerated--as a matter of principle.

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[10] p. 149, Jonathan Elliot, op. cit., vol. IV.

Why, despite such prophecies, did the best anti-federalist arguments (like Federal Farmer[11]) persuade people that the 1787 Constitution required a complementary Bill of Rights? Federal Farmer argued, in this connection, that any negative inference drawn from enumeration of certain rights could be expressly rebutted (by a provision like the Ninth Amendment for example), and then pointed to the inestimable value of a Bill of Rights:

> "We do not by declarations change the nature of things, or create new truths, but we give existence, or at least establish in the minds of the people truths and principles which they might never otherwise have thought of, or soon forgot. If a nation means its systems, religious or political, shall have duration, it ought to recognize the leading principles of them in the front page of every family book. What is the usefulness of a truth in theory, unless it exists

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[11] See pp. 23-95, Herbert J. Storing, ed., The Anti-Federalist (1985).

> constantly in the minds of the people, and has their assent...--Men, in some countries do not remain free, merely because they are entitled to natural and inalienable rights; men in all countries are entitled to them, not because their ancestors once got together and enumerated them on paper, but because by repeated negociations and declarations, all parties are brought to realize them, and of course to believe them to be sacred."[12]

Paradoxically, Federal Farmer shares Iredell's worries that later generations living under an enduring written republican constitution will lose faith with the principles of republican morality, but--in contrast to Iredell--he perceives a bill of rights as a way of preserving such values, reminding each generation of the arguments of principle through which they acknowledge one another as free and equal members of a co-operative community. If the point of a written constitution was, as Madison argued[13], to use the deeply human sense of historical tradition in service of republican values, a bill of rights would, as Federal Farmer cogently argued, naturally complement and advance this end;

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[12] pp. 80-1, Herbert J. Storing, ed., The Anti-Federalist.

[13] See No. 49, Federalist Papers.

thus Madison, despite earlier reservations[14], is not unnaturally the central leader in the drafting and passage of the Bill of Rights[15]. But the capacity of the Bill of Rights to meet Federal Farmer's hopes and quell Iredell's fears obviously turns on whether guarantees of rights--enumerated and unenumerated--are responsibly interpreted by each generation in service of enduring republican principles (establishing "in the minds of the people truths and principles they might never otherwise have thought of, or soon forgot"[16]).

We need then to make the best interpretive sense we can of the idea of unenumerated rights of the person if we are to remain faithful to an enduring written constitution, a constitution based on a theory of republican legitimacy (i.e., the reservation of all inalienable human rights from state power). How should we understand these rights, and does the constitutional right to privacy appear among them?

2. The Political Theory of American Constitutionalism

Inalienable rights of the person--both rights enumerated and unenumerated in the 1787 Constitution, 1791 Bill of Rights, and the 1868 Fourteenth Amendment--define private spheres of moral independence from state power on terms of equal respect for all persons living in a cooperative community as democratic equals[17]. Both the equal liberties of conscience and speech--essential to any plausible understanding of the enumerated rights guaranteed against the federal government by the First Amendment and against the states by the Fourteenth Amendment--define, for example, essential spheres of independence from state power in which persons may form, express, and revise their conceptions of personal and ethical value in living and communicate with one another about these conceptions[18]. Constitutional protection of such independent spheres of conscience and speech enshrines a larger conception of the democratic accountability of state power to the independent conscience of people as democratic equals, namely, a benchmark of secure equal liberties from which state power can be fairly judged by each and every person to respect their rights and pursue the public good. Both enumerated and unenumerated rights are textually guaranteed as spheres of moral independence essential to the larger republican conception of government in service of a people who are self-governing not only in politics but in all spheres essential to the integral exercise of the essential moral powers through which people define, find, and foster values in living and in the communities in service of those values.

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[14] See, e.g., pp. 620, 626-6, Jonathan Elliot, op. cit., vol. III.

[15] See pp. 160-191, Bernard Schwartz, The Great Rights of Mankind (1977).

[16] p. 80, Federal Farmer, Herbert S. Storing, ed., The Anti-Federalist (1985).

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[17] See, in general, John Rawls, A Theory of Justice (1971); Ronald Dworkin, Law's Empire (1986); David Richards, Toleration and the Constitution (1986).

[18] See id., pp. 67-227.

This larger conception of essential spheres of moral independence naturally includes protection of the right of intimate association[19] that underlies, I believe, the traditional understanding, reflected in Griswold v. Connecticut[20], of a fundamental right to marriage. That understanding is quite clearly implicit in the historical understanding of the scope of unenumerated rights assumed by the Founders[21]. Witherspoon, Madison's teacher at Princeton, follows Hutcheson[22] in denominating marriage as a fundamental right of a free people, linking it to a more general right of associational liberty essential to the moral independence of a self-governing people[23]. It is not difficult to interpret that historical understanding as a coherent expression of a basic principle of protected moral independence worth carrying forward in the community of principle that underlies the American commitment to an enduring written constitution.

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[19] See K. Karst, "The Freedom of Intimate Association", 89 Yale L.J. 624 (1980).

[20] 381 U.S. 479 (1965).

[21] For example, leading statesmen at the state conventions ratifying the Constitution, both those for and against adoption, assume that the Constitution could not interfere in the domestic sphere. Thus, Hamilton of New York denies that federal constitutional power does or could "penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals", p. 268, Jonathan Elliot, op. cit., vol. II. And Patrick Henry of Virginia speaks of the core of our right to liberty as the sphere where a person "enjoys the fruits of his labor, under his own fig-tree, with his wife and children around him, in peace and security", p. 54, Jonathan Elliot, id., vol. III. And a leading Founder, Oliver Ellsworth of Connecticut, in rebutting the anti-federalist argument that the Constitution of 1787 did not protect a free press, referred to other reserved rights, including the right to marriage, that could not be abridged: "Nor is [there a declaration preserving] liberty of conscience, or of matrimony, or of burial of the dead; it is enough that congress hage no power to prohibit either, and can have no temptation." To the Landholders and Farmers, Conn. Courant, Dec. 10, 1787, reprinted in 14 The Documentary History

The understanding of an unenumerated right to marriage--expressed in the historical understanding--reflects a larger historical conception of companionate marriage[24], marriage as a voluntarily formed association of intimate friendship and love through which persons realize the complementary

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of the Ratification of the Constitution: Commentaries on the Constitution 398, 401 (J. Kaminsky & G. Saladino ed. 1983) [hereinafter Commentaries]; see also To the Holders and Tillers of Land, Conn. Courant, Nov. 19, 1787, reprinted in 14 Commentaries, supra, at 139, 401 (referring to rights of personal liberty "more sacred than all the property in the world, the disposal of your children"). It is striking that the arguments of both leading proponents (Hamilton, Ellsworth) and opponents (Henry) of adoption of the Constitution converge on this private sphere of domestic married life.

[22] See Francis Hutcheson, A System of Moral Philosophy 299 (1968).

[23] Witherspoon lists, as a basic human and natural right, "a right to associate, if he so incline, with any person or persons, whom he can persuade (not force)--under this is contained the right to marriage", John Witherspoon, Lectures on Moral Philosophy 123 (Jack Scott ed. 1982).

[24] See, e.g., Lawrence Stone, The Family, Sex and Marriage 325-404 (1977).

fulfillment of essential needs for the mutual support, companionship, and understanding that is often the very basis for sustaining enduring personal and ethical values in living a complete life. That new conception of marriage is, I believe, root in a larger republican conception of self-governing people guaranteed the moral independence to form the range of communities essential to the integral expression of their moral powers[25]. Marriage is thus correctly characterized by Witherspoon as an instance of a larger republican right of democratic association because marriage, as much as religious or political or other associations, is one of the associations essential to sustaining the moral independence required for republican self-rule. State abridgement of such associational liberties on constitutionally inadequate grounds usurps the essential intellectual and emotional resources of the moral independence at the very foundation of republican respect for a self-governing people; it is, conversely, no accident that modern totalitarianism has warred on the value of republican self-rule in terms of the illegitimacy of private life: "There is no such thing as a private individual in National

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[25] See, in general, Lawrence Stone, The Family, Sex and Marriage (tracing historical development of marriage from deferential patriarchy to expression of autonomous individual affection). On Locke's attack on patriarchal political morality, see Richards, "The Individual, the Family, and the Constitution: A Jurisprudential Perspective", 55 N.Y.U. L. Rev. 1, 14-15 (1980).

Socialist Germany"[26].

3. Judicial Reasoning

We in America look to the judiciary to "at least establish in the minds of the people truths and principles which they might never otherwise have thought of, or soon forgot"[27]. And the judiciary has, as a matter of sound interpretive principle and role, elaborated the original understanding to protect unenumerated rights in general and the right to marriage in particular to remind the people of the "truths and principles" of unenumerated rights. The Supreme Court thus properly infers the constitutional right to privacy in Griswold because Connecticut's coercive intrusion into marital sexuality (the married couples could neither buy nor use contraceptives) inhibits one of the decisions central to companionate marriage, i.e., whether and when one will have offspring. The constitutional right to privacy begins in a case that concurrently involves privacy in another sense, namely, the egregious violation of the informational privacy interests protected by the Fourth Amendment that criminal prosecutions of contraception use would require (bugging the marital bedroom). But, as the

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[26] p. 178, E.K. Bramstedt, Dictatorship and the Political Police (1945).

[27] pp. 80-1, Herbert J. Storing, ed., The Anti-Federalist.

Court clearly recognized in that case and made clear in later cases, the pertinent constitutional violation is independent of the Fourth Amendment violations; it turns on coercive intrusion into the right of associational liberty traditionally associated with marriage on terms that cannot satisfy the constitutionally required burden of justification.

That burden of justification--familiar from constitutional rights like religious liberty and free speech--requires that basic rights of the person can only be abridged on the ground of protecting general goods like life, liberty, and property, *i.e.*, the protection and vindication of the claims of persons for the neutral goods all would require to lead their lives as free persons irrespective of other ideological differences in basic religious and other commitments[28]. Anti-contraception laws cannot satisfy this burden of justification in contemporary circumstances. Indeed, if anything, contraception today advances the social good of population control, and the individual good of enabling married couples to exercise more control over their reproductive lives consistent with their larger personal and ethical ends.

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[28] See pp. 244-47, David Richards, Toleration and the Constitution.

This understanding of Griswold is, of course, implicit in the concurring opinion in that case of Justice Harlan, and his related dissent in Poe v. Ullman[29]. It rests on a larger conception of unenumerated rights of the person explicitly guaranteed by the text, history, and political theory of the United States Constitution, and the principled judicial protection of the unenumerated right of marital association against intrusive state prohibitions of intimate private life unsupported by the heavy burden of secular justification clearly required.

Such a burden of justification can, in principle, be met by some criminal prohibitions bearing on the right of constitutional privacy. There would, I assume, be no constitutional objection to the application of neutral criminal statutes to intrafamilial murders, or wife or husband beatings, or child abuse, no matter how rooted in intimate family life and sexuality; nor should there be any objection to rape laws if applicable to married or unmarried sexual intimacies. In these cases, the constitutional burden of justification is met: countervailing rights of persons justify coercive interference into intimate relations. On the other hand, criminal prohibitions on use of contraceptives could not meet this burden of justification.

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[29] 367 U.S. 497 (1961).

It follows, a fortiori, that state burdens that do not thus coercively abridge fundamental rights are often justified on a less compelling showing of justification. Certainly, anti-smoke pollution ordinances are thus justified on the ground of legitimate health concerns, and the kind of regulation at stake in Lochner v. New York[30] rests on justified concerns to equalize bargaining power in the marketplace.

The American constitutional tradition reflects a deep consensus on fundamental unenumerated rights, a consensus shown by the fact that Justice Harlan--a great judicial conservative--saw constitutional privacy as a principled elaboration of this tradition. The idea that unenumerated rights are foreign to the Constitution thus distinguishes neither liberal nor conservative constitutional jurisprudence; for it is wholly foreign to the text, history, political theory, and continuous judicial tradition of American public law. It is, in the worst sense, radical: outside the deep consensus on values of Americans as free people under the rule of law. It is supremely paradoxical that such a claim should be sponsored by the rhetoric of Founders' intent, for, as I have shown, the best reading of that intent is undoubtedly that unenumerated rights are at the core of the American conception of constitutionalism.

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[30] 198 U.S. 45 (1905). Robert Bork argues that Griswold cannot be distinguished from these cases at 47 Ind. L.J. 9-11.

We have the right and the duty to demand more of prospective justices to the Supreme Court of the United States than a rigid interpretive attitude that, against the weight of so much argument and authority, can so playfully dismiss unenumerated rights as enduring values of American constitutionalism, for that view is driven by a kind of self-blinding ideology that shows respect neither for text, nor history, nor political theory, nor judicial role, for it would either uproot constitutional privacy entirely or narrowly cabin the doctrine in utterly unprincipled ways[31]. The Founders did not operate in such a morally vacuous universe, for they had fought a revolution and constructed a constitutional order for the fullest defense of human rights under the rule of law that had yet graced human history. Robert Bork's interpretive philosophy illustrates, as I earlier suggested, one of their fears: he is Iredell's nightmare, an interprer who--in defiance of the Ninth Amendment--would betray the central premisse of American constitutionalism, the protection on fair terms of all inalienable rights. We should, in this great bicentennial moment, remember the words of the founding generation about why we needed a bill of rights at all: namely, to "at least establish in the minds of the people truths and principles which they might never otherwise have thought of, or soon forgot" for "[m]en ...do not remain free, merely because they are entitled to natural and inalienable rights"[32]. We need, as a people, to recapture our constitutional heritage of inalienable rights under the rule of law, and to demand of ourselves and, above all, of our judges understanding of and respect for that heritage.

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[31] See, e.g., Franz v. United States, 707 F.2d 582, Addendum to the Opinion for the Court, 712 F.2d 1428 (D.C. Cir. 1983) (Tamm, Edwards and Bork, concurring and dissenting), in which Judge Bork refused to give any constitutional protection to a father's powerful biological, emotional, and legal connection with his children because the Supreme Court had not specifically addressed this situation.

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[32] pp. 80-1, Herbert J. Storing, ed., The Anti-Federalist.

The CHAIRMAN. Thank you very much. Professor Sullivan, as you can see, the pressure mounts as it goes down.

TESTIMONY OF KATHLEEN SULLIVAN

Ms. SULLIVAN. Yes. The last person must go quickly.

I have just two points to make, and I will try to make them quickly, Senator Thurmond.

The first point: Judge Bork, when he came before the committee on September 15th, on the basis of both his writings as a professor and his writings and speeches since his appointment to the D.C. circuit, when he came before you on September 15th, he was on the basis of those writings—as my colleague, Professor Kay, has laid out—outside the mainstream on the right to privacy. I want to make that point a little bit more clearly in a moment.

My second point is that nothing he said to the committee since September 15th indicates any departure from that place outside the mainstream on the right to privacy. That is, Judge Bork has made no confirmation conversion on the right to privacy in the last several weeks.

Now, to try to clarify the point that Judge Bork was outside the mainstream on the basis of his writings as a professor and his writings as a judge on the D.C. circuit, and speeches during that period, let me just say this: He says there is no right in the Constitution of privacy that protects parents' rights to educate their children in private schools; no right of privacy in the Constitution that says a married couple is entitled to use contraceptives in their own bedroom; no right of privacy in the Constitution not to be sterilized by compulsion of the State; no right of privacy in the Constitution to marry someone whom you love but who is of a different race; no right of privacy in the Constitution to marry someone if you are a debtor and the State does not want you to marry.

In every one of those instances, the Supreme Court has said there is a right of privacy that protects those activities. He has said there is not.

Now, why is it so clear that he was outside of the mainstream? It is true the Court had been divided on some of those cases. Here is why he was outside the mainstream.

There is no other sitting Justice currently on the Court and no other Justice on the Court in the last three decades, the period in which he has been writing and speaking on the subject, no other single Justice that has taken that absolute and categorical and extreme a position—if I may use that word—on the right to privacy.

Justice Black, who is often cited as an enemy of unenumerated rights, signed the opinion in *Skinner* v. *Oklahoma* that said not only that certain poor criminals could not be sterilized; it said that marriage and procreation are basic civil, fundamental rights of man. It was a liberty case, not just an equal protection case.

He also signed *Bolling* v. *Sharpe*, the case that said on the basis of the liberty clause in the fifth amendment that D.C. school children could not be segregated in their schools. And he also signed *Loving* v. *Virginia*, the case in which the Court held that not just equal protection, but also liberty, privacy protected the right to marry someone of a different race. He signed all those decisions. He did not write a concurrence; he did not say that he disagreed with the existence of the right to privacy.

Similarly, Justices Stewart, White, Rehnquist, Scalia and O'Connor at different points have all signed opinions that upheld the right to privacy. They may disagree about its scope, but none of them has disagreed about its existence. That is what set Judge Bork apart from all contemporary Justices when he walked into this room.

Now, has anything changed since he walked into this room? The unequivocal and perfectly clear answer is no. He has said some reassuring things. He has said he is a man who appreciates privacy, and I have no doubt that is an honest truth. He has said the Constitution ought to protect a great deal of privacy in our society; every civilized person would want that, and I have no quarrel with that. I am sure that is the truth. But he has said nothing—nothing—to suggest that he believes there is any legitimate ground for finding a right to privacy in the Constitution.

Oh, he has tried to reassure the committee. He said, "Well, these laws, these morals laws, they will not be enforced." That would be cold comfort to Mrs. Inez Moore, sentenced to 5 days in jail because she violated an East Cleveland zoning ordinance that banned her from living with her sons and grandsons in the same house. That would be cold comfort to Bill Baird, who was criminally convicted for giving out a package of contraceptive foam; cold comfort to the poor people of Connecticut who were unable to get birth control in Connecticut at clinics for two decades because the Connecticut birth control law struck down in *Griswold* had led to the closing of those clinics.

These laws are enforced; they can be and will be enforced.

I will close, Mr. Chairman, with just one second point. He has also tried to reassure you that his ears are open to a new argument for the right to privacy. I submit, and I would be happy to elaborate on this later, that there can be no better argument than the great Justices Harlan, Powell, moderates and conservatives on the Court, have already given for the right to privacy. And if he has not heard the music in what they have said so far, I have no expectation that he will hear it in some new echo to come.

Thank you very much.

[The statement of Professor Sullivan follows:]

TESTIMONY OF KATHLEEN M. SULLIVAN
BEFORE THE SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF JUDGE ROBERT H. BORK
TO THE UNITED STATES SUPREME COURT

September 29, 1987

My name is Kathleen Sullivan. I am an Assistant Professor of Law at Harvard Law School, where I teach and write about constitutional law, criminal law, and local government law. I have served as co-counsel in six cases involving constitutional issues before the United States Supreme Court, and have co-authored amicus curiae briefs in several others. I am pleased to appear at the Committee's invitation to testify about Judge Bork's stated views on the constitutional right of privacy.

THE TRADITION OF THE RIGHT OF PRIVACY

The constitutional right of privacy has a seventy-five year tradition in the United States Supreme Court. Since at least 1923, the Court has held that government may not interfere with our family lives, or our most intimate decisions, unless it has a very good reason. Finding no such reason, the Court in 1923 struck down a Nebraska law forbidding the teaching of foreign languages to children, noting that our tradition of liberty encompasses the right "to marry, establish a home and bring up children," among others. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Two years later, the Court relied on Meyer to strike down an Oregon law making it a crime to educate one's children in private or parochial schools, holding that the law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925). While decisions from this era upholding sweeping economic liberties did not survive the New Deal, both Meyer and Pierce, and the fundamental principles of personal liberty for which they stand, have been repeatedly reaffirmed.

In 1942, the Court recognized a further strand in our fundamental personal liberty: the right to be free of compulsory sterilization by the state. Oklahoma had a law providing that "habitual criminals" be punished by vasectomy. An Oklahoma chicken thief was so sentenced, because he had stolen not once but three times. A unanimous Supreme Court saved him from the surgeon's knife. As Justice Douglas wrote for the Court, "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. . . . There is no redemption for the individual whom the law touches. . . . He is forever deprived of a basic liberty." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

In 1965, the Supreme Court again struck down a state law invading the private realm of marriage and procreation. This time it was a Connecticut law making it a crime for a husband and wife to use birth control devices in the privacy of their own bedroom. The seven Justices who joined forces to invalidate that law gave varying reasons for that decision. See Griswold v. Connecticut, 381 U.S. 479 (1965). Justice Douglas wrote for all but Justices Harlan and White that a right of privacy for marital intimacies is implied by other protections expressly included in the Bill of Rights, including the freedoms of speech and conscience and the freedom from unwarranted state intrusion into our homes. See 381 U.S. at484-85. Justice Goldberg wrote for himself, Chief Justice Warren, and Justice Brennan that the right of marital privacy, although not specifically listed in the Constitution, is protected by the Fourteenth Amendment's guarantee of liberty, read in light of Ninth Amendment's reminder that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." See 381 U.S. at 486-99. Justice Harlan, echoing his earlier great and oft-quoted dissent in Poe v. Ullman, wrote that the Connecticut law violated the Fourteenth Amendment because it violated "basic values 'implicit in the concept of ordered liberty.'" 381 U.S. at 500 (quoting Justice Cardozo's opinion in Palko v. Connecticut, 302 U.S. 319, 325). And Justice White likewise wrote that a law making family planning a crime deprives married persons of liberty without due process of law. See 381 U.S. at 502-04.

However different these various opinions were in their specific reasoning, they all shared in common this much: they all held that in our constitutional system, the government had better have a far stronger reason when it seeks to police the marital bedroom than it must provide when it polices the streets.

By elaboration of the fundamental right first acknowledged in Meyer and Pierce, Skinner, and Griswold, the Supreme Court has since struck down a variety of other state laws making our decisions about marriage, childrearing, or childbearing a crime. As to marriage, in Loving v. Virginia, 388 U.S. 1 (1967), the Court unanimously struck down a Virginia law that, like the law of 16 other states at the time, forbade interracial marriage, on pain of a sentence to jail. As Chief Justice Warren wrote for the Court, the law not only violated the Fourteenth Amendment's ban on race discrimination, but also deprived Mildred Loving, a black woman, and Richard Loving, a white man, of liberty without due process of law, because "[m]arriage is one of the 'basic civil rights of man.'" See 388 U.S. at 12-13 (quoting Skinner). The Court has repeated this holding again in striking down laws interfering with the choice to marry by the poor and by those in prison. See Zablocki v. Redhail, 434 U.S. 374 (1976); Turner v. Safley, 107 S. Ct. 2254 (1987).

The right to rear our families in the face of our neighbors' disapproval has likewise been reaffirmed. In Moore v. City of East Cleveland, 431 U.S. 494 (1977), the Court struck down the criminal conviction of Mrs. Inez Moore under a local zoning law that forbade her from living, in extended family fashion, with her son and her grandsons Dale and John.

And as to the deeply private "decision whether to bear or beget a child," the Court has recognized its application to single as well as to married persons, and has struck down laws held to place an unwarranted governmental burden on access to contraceptives, Eisenstadt v. Baird, 405 U.S. 438 (1972); Carey v. Population Services Int'l, 431 U.S. 678 (1977), and on the choice to obtain an abortion, Roe v. Wade, 410 U.S. 113, 152-53 (1973), and subsequent cases.

JUDGE BORK'S CRITICISM OF THE RIGHT OF PRIVACY

Writing both as professor and as lower-court judge, Robert Bork has repeatedly and scathingly attacked this entire line of Supreme Court decisions as illegitimate. As Professor and Judge Bork would have it, there is no consitutional right of privacy, and accordingly, although laws intruding on our private lives may be stupid, they may not be struck down.

In his 1971 Indiana article, for example, he called Griswold an "unprincipled decision." Neutral Principles and Some First Amendment Problems, 47 Ind. L. J. 1, 9 (1971). Nor did he find fault merely with the reasoning of the Court: "The truth is that the Court could not reach its result in Griswold through principle." Id. (emphasis added). Why not?

> The reason is obvious. Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups. When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the respective claims to pleasure. Compare the facts in Griswold with a hypothetical suit by an electric utility company and one of its customers to void a smoke pollution ordinance as unconstitutional. The cases are identical.

Id. Why are they identical? Because the "husband and wife [who] wish to have sexual relations without fear of unwanted children" are no different, constitutionally speaking, from the would-be polluter who would prefer lower prices to cleaner air. Id. at 9-10. Both want their "gratifications." The majority would be "gratified," however, to stop them. Since the Constitution mentions neither contraceptives nor smoke, the Court must stand by and "let the majority have its way in both cases." Id. at 10.

In other words, when it comes to privacy, the Court must read the Constitution narrowly and literally. If there is nothing about "sexual gratification" in the text of the Constitution, then our constitutional liberty must stop at the bedroom door. And if the Constitution does not mention pregnancy, the our access to condoms, diaphragms, birth control pills, and safe legal abortions cannot be protected by the courts.

Thirteen years later, Judge Bork agreed thoroughly with Professor Bork on this point. In *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984), the Court held, per Judge Bork, that the consititutional right to privacy did not protect a Navy officer from discharge for homosexual conduct. That result, though deeply controversial, *see, e.g.,* Dworkin, *Reagan's Justice*, 31 N.Y. Review of Books, at 27-31 (Nov. 8, 1984)(criticizing Judge Bork's opinion in *Dronenburg*), was not in itself surprising. The right of privacy had never been extended to *all* consenting adult sexual conduct, and courts have long paid more deference to military than civilian rules where internal discipline and morale are concerned. The same result could thus have been reached in a quick paragraph stating that, whether or not the right of privacy embraced consenting adult homosexual conduct, the military had adequate reason to forbid it in its barracks. What *was* surprising was that Judge Bork did nothing of the kind. Instead, he spent nearly two-thirds of his opinion asserting that previous privacy cases decided by the Supreme Court contained "no explanatory principle," and thus could be limited roughly to their facts -- unlike all other cases elaborating constitutional rights. 741 F.2d at 1395.

Nor has Judge Bork undergone any "confirmation conversion" on the matter of the right of privacy. Rather he has testified to this Committee that he continues to view *Griswold* and the cases that follow it as wrongly decided. At the same time, he has told the Committee that "no civilized person wants to live in a society without a lot of privacy in it." Transcript, Sept. 16, p. 45. Why, then, doesn't it trouble him to maintain that the privacy decisions are thoroughly wrong?

He has given the Committee three reasons why not. None is satisfactory. First, he has said that we simply need not worry that such grossly intrusive as the Connecticut ban on birth control will ever really be enforced. See, e.g., Transcript, Sept. 16, pp. 49-50 ("if anybody had tried to enforce [the Connecticut law], he would have been out of office instantly and the law would have been repealed"); Transcript, Sept. 15, p. 188. In other words, Judge Bork suggests, trust the majority not to invade your privacy, and if it passes a law that does so, not to mean what it has said.

But the powerless, the outnumbered, and the unorthodox cannot share such faith in the benificence of the powers that be. Judge Bork's declarations of faith in the good sense of local majorities would surely have been cold comfort to Mr. Skinner when he was sentenced in Oklahoma to involuntary vasectomy. Or to Mr. Baird when he was criminally convicted in Massachusetts for giving out a package of contraceptive foam. Or to Mrs. Moore when she was ordered to spend five days in jail for heading a household her neighbors deemed not nuclear enough. In other words, laws that invade privacy do not always fall into "desuetude" as Judge Bork suggests; rather, they have been and are enforced. Moreover, even when such laws are underenforced, they may lie about on the statute books like a loaded weapon, exerting a chilling effect. For example, the Connecticut statute struck down in Griswold had long effectively shut down birth control clinics in the state, a fact of critical importance to those who brought the lawsuit. See Griswold, 381 U.S. at 503 (White, J., concurring in the judgment)("the clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control").

Second, Judge Bork has told the committee that there is always the possibility that "maybe somebody would offer" him a new argument for the constitutional right to privacy that he could accept. Transcript, Sept. 15, p. 136; see id. p. 135, p. 143. There is little reason to hope, however, that any new star could now appear in the constitutional firmament to guide Judge Bork to the result the Court reached in Griswold and subsequent privacy cases. The various opinions in Griswold already mapped all the possible textual terrain on which the right of privacy might be located: the structure of limited government set forth in the Bill of Rights, the reservation of unenumerated rights in the Ninth Amendment, and the liberty clause of the Fourteenth Amendment.

Moreover, Judge Bork's objections to the Supreme Court's elaboration of the right of privacy have already been eloquently answered by sitting members of that Court -- including some of its most distinguished conservative and moderate Justices. To Judge Bork's objection that courts are simply imposing their own value preferences on the people when they uphold a right of privacy, Justice Goldberg has already answered as follows:

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and [collective] conscience of our people' . . . . [and to] 'experience with the requirements of a free society.'" Griswold, 381 U.S. at 493 (Goldberg, J., concurring).

In other words, when the Court upholds the right to privacy, it is not just imposing its own values on society; it is saying instead that, whether it likes your family arrangements or your reproductive choices or not, they are yours and yours alone to make.

Likewise, Justice Harlan long ago gave the most eloquent imaginable answer to Judge Bork's objection that the right of privacy is too broad, capacious, and undefined; he wrote:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. . . . [Our] "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary implostitions and purposeless restraints.

Poe v. Ullman, 367 U.S. 497, 542-43 (Harlan, J., dissenting). And as Justice Powell echoed more recently, the right of privacy is not to be "cut[] off . . . at the first convenient, if arbitrary boundary"; rather judges must elaborate that right through "careful 'respect for the teaching of history [and] solid recognition of the basic values that underlie our society.'" Moore v. East Cleveland, 431 U.S. at 503 (plurality opinion). There is no reason to suppose that if these answers have not yet satisfied Judge Bork, others will do so in the future.

Third, Judge Bork has suggested that even if no new argument were to persuade him that laws infringing privacy merit heightened scrutiny, perhaps they might still be struck down as unreasonable. See, e.g., Transcript, Sep. 15, p. 133 ("there is always a rationality standard in the law"), p. 138 (suggesting that the sterilization law in Skinner might have been struck down as lacking a "reasonable basis"). The short answer to this is that rationality review has always involved virtually flat deference to legislatures, and to the extent that Judge Bork would now put teeth in that test, his standard is at least as broad, capacious, and undefined as the one he has criticized.

In sum, Judge Bork's repeated criticism of the constitutional right of privacy stands unaltered by his testimony of two weeks ago. While the Committee may face the difficult matter of deciding what weight to place on Judge Bork's "confirmation conversion" with respect to other matters, it simply need not do so here. On the constitutional right of privacy, he has been and is consistent. And his hostility to that right has been greater than that of any other recent Justice -- moderate, conservative, or liberal. Because that right embodies nothing less than "the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society," Poe v. Ullman, 367 U.S. at 542 (Harlan, J., dissenting), Judge Bork's views about that right should be of grave concern to the Committee and the Senate.

The CHAIRMAN. Thank you very much.

I really do regret that we do not have much more time because—I make no bones about it—my overwhelming concern about Judge Bork being on the Court from the outset as I became acquainted with his writings, his speeches, and his theories, relates to this specific issue. This issue overriding all others, as far as this Senator is concerned.

When I opened these hearings, I opened them on that note. Quite frankly, I believe it is not just whether or not Judge Bork, who was forthright when he spoke here in acknowledging he found no generalized right of privacy, and acknowledging that he had a different view from whence our rights came, as you pointed out, Professor Richards. My opening statement indicated that I believed I have certain rights because I exist, not because the Government acknowledges they exist. That is contrary to his entire constitutional theory, and he did not deny that.

Quite frankly, I am less worried about his going back and overruling cases that exist—because I do not think he could convince four Justices to overrule prior cases, although I think he would want to. If he were going to be intellectually consistent, he would attempt to. But what worries me is where we go from here.

Just as in the early 1960's, actually from the 1940's through the early 1960's, a debate raged in this country about birth control, and Judge Bork clearly—and he acknowledges it—would have come down on the side I call the anti-liberty side of the argument. Who knows what the great debates relating to privacy will be in the next 10 years? Admittedly, they probably will not be contraception, but they may be invasions of our personal freedoms, our right, as Judge Bell said yesterday, to be let alone because of increased sophistication and fear of new dilemmas that we face.

God only knows what will happen in this country if the AIDS crisis reaches the proportions that has been suggested by the medical community. What will happen to our rights of privacy in that atmosphere of hysteria that could develop? Where are our rights to privacy going to go and how will Judge Bork and others, if they cannot find the right existing in the first instance, rule in the future on those things we cannot even fully contemplate but we know government will be confronted with, and once again, as has happened in every generation from the beginning of this republic, there is a conflict between the rights of individuals and government? And where will Judge Bork come down?

Will he be part of the progression of 200 years of history of every generation enhancing the right to privacy and reading more firmly into the Constitution protection for individual privacy? Or will he come down on the side of government intrusion?

I am left without any doubt in my mind that he intellectually must come down for government intrusion and against expansion of individual rights.

Now, I have one question. I have refrained from these perorations the last 10 days, but I have one question. I will start with you, if I may, Professor Sullivan.

That is, we are told that obviously the State is not going to do things like pass birth control laws like Connecticut, and that we really do not have to worry because no legislator would ever enact legislation that infringed upon basic rights. Do you believe that to be true, and can you translate it into everyday terms so people understand out there? They do not care about the past. They want to know what are the things we have to worry about in the future.

A tough question, but can you speak to it?

Ms. SULLIVAN. History shows, Mr. Chairman, the exact opposite of Judge Bork's assurance that we can trust majorities, we can trust the good sense of the powers that be never to infringe privacy. History shows the opposite.

The birth control law in Connecticut was enforced in the 1940's; clinics were closed down. A law that seems unbelievable to us today, a product of old eugenic thinking, that said sterilize chicken thieves if they steal three times, not only was that law enforced, but the man it was enforced against, Mr. Skinner, was saved from the surgeon's knife only by the U.S. Supreme Court. Various doctors and other people involved in the attempt to give medical advice about birth control were arrested. Bill Baird was arrested in Senator Kennedy's home State of Massachusetts for distributing contraceptive foam.

Mrs. Inez Moore, it seems incredible to us, here is a grandmother. She lives in an extended family. One of her grandchildren's mother had died, so the grandchildren, cousins, had come to live under her roof. This city of East Cleveland did not like extended families, thought they tended to be a nuisance, liked the nuclear family, and they said, "This is against our zoning law." Incredible? Incredible that a majority would have this law. And Mrs. Inez Moore, the grandmother, for living with her grandsons Dale and John, who were cousins rather than siblings, was sentenced to 5 days in jail, a sentence that——

The CHAIRMAN. When did that occur?

Ms. SULLIVAN. It occurred because——

The CHAIRMAN. When? How long ago was it?

Ms. SULLIVAN. 1977. As recently as the last decade.

The law was enforced. It was the Supreme Court, in a plurality opinion eloquently set forth by Justice Powell, that said the family is part of our tradition. There is a right of privacy and family to live with your grandsons, and the majority of neighbors who do not approve cannot stop you.

So those examples suggest that history shows the right to privacy has been infringed, these laws have been enforced. Now, as to the future, Mr. Chairman, I think you are absolutely right. There is no reason to suppose that new and different laws will not come on to the horizon that threaten privacy in new and previously unforeseen ways. We should bear in mind the words of the great conservative Justice on so many issues, Justice Harlan, and his ideological heir, Justice Powell, that the Court should acknowledge the existence of the right to privacy but tread carefully in defining its scope. You elaborate the right slowly, incrementally, over time, with attention to our tradition, our history, our basic underlying values. You do not go wild with it. You do not protect anything people say is private. You protect what our traditions say make us a free people.

Now, whether that will come up in the area of new birth technologies, new ways of producing children, or in the area of public health laws interfering with people's sexual lives because of fear of disease, we cannot predict. But I believe that Justice Harlan, Justice Powell have the better of the argument. They say the right exists, let us be careful about defining its scope.

Judge Bork disagrees. He says it does not exist, and, therefore, he sees no need to engage in that argument that you refer to about what should its scope be. That is the difference between him and his contemporaries and other great Justices of the previous generation on the Court.

The CHAIRMAN. Thank you very much. My time is up, unfortunately. I wish I could pursue this, but I will yield to my colleague from South Carolina. Thank you.

Senator THURMOND. I just want to welcome you all here. I have no questions.

I might say, when I was in school, I did not have any pretty teachers like Ms. Kathleen Sullivan.

Ms. SULLIVAN. Thank you kindly, Senator.

Ms. KAY. Senator Thurmond, may I take this opportunity to say hello to you. I am a native of South Carolina, and you were the Governor of my State when I was there in high school. It is a pleasure to see you under these circumstances.

Senator THURMOND. I am certainly glad to see you again, too.

The CHAIRMAN. And I might say for the record, only Senator Thurmond could say what he just said and have a distinguished scholar look back at him and smile and say thank you. You are a rarity in American politics, Mr. Chairman. I wish I had the reservoir of good faith that you possess.

The Senator from Massachusetts.

Senator KENNEDY. Thank you, Mr. Chairman.

As the panel has pointed out so well, the position of Judge Bork has been that there are no rights of liberty or privacy other than those specifically enumerated in the text of the Constitution. Professor Sullivan has given some practical examples of where legislatures, perhaps even the federal government or Congress, can enact certain specific laws which would infringe upon that right.

I am wondering if members of the panel, perhaps Professor Richards or the other members of the panel, could review with us for just a moment the *Meyer* case and the *Pierce* case. First of all, let me ask you this:

As scholars, do you know any current Supreme Court Justice who holds the narrow and constricted view that Judge Bork has with regards to the rights of privacy? Just quickly, the panel.

Mr. RICHARDS. You mean current Justices?

Senator KENNEDY. Yes.

Mr. RICHARDS. No.

Ms. SULLIVAN. No.

Senator KENNEDY. For the record, all three indicated no.

Now, as I understand it, the development of this right, as Professor Sullivan has pointed out, really has occurred in recent times. The testimony we have is that it can be traced back to perhaps the *Meyer* case and the *Pierce* case, both cases which Judge Bork has indicated had been wrongly decided. That has been his testimony that both of those cases were wrongly decided.

Rather than going through the elaborate facts of the *Meyer* case and the *Pierce* case, could you give us some sense about what the holdings were and whether the opinions were written by individuals who had a cautious or perhaps even a conservative philosophy, or whether those individuals were considered at the time as being outside of the mainstream for making those findings. As I understand it, those are really the watershed decisions in terms of paving the way for the current Supreme Court belief that these privacy rights are very real and should be protected.

Could you tell us a little bit about those decisions, Professor Richards?

Mr. **RICHARDS**. These cases do come down early in this century, quite a time before *Griswold*. They are decided by, I think, both of them by McReynolds who is regarded, I think, as a quite conservative jurist. They are rooted in a conception of a private sphere. *Meyer* involved the right of a parent to send their child to a German-speaking school. It is the right of a parent to decide that they want their child to be taught the German language, which the State had forbidden. And *Pierce* involved the right of a parent to send a child to a parochial school, which the State had denied.

In both cases, the Court said this is a fundamental right of a parent over their child, and the State had not satisfied the requisite burden that is required in these kinds of cases.

Now, these cases are decided during a period that is called the heyday of substantive due process. Many of those cases in the 1930's are overruled, but these cases remain good law and, indeed, they are cited in *Griswold* as authority for the proposition that there is a private sphere of marriage and of a parent's right over their children which has to be immunized from a State power—in the *Pierce* case in a kind of environment of religious intolerance; in the case of *Meyer* ethnic intolerance—and that parents have a right to control the lives of their children and to be free from this kind of religious or ethnic prejudice. And the Court has to protect them in these autonomy rights when there is not the requisite burden of justification.

They are, I think, lineally connected to the *Griswold* line. I mean, it is that general area of a morally independent sphere of marriage, child-rearing and the like, and a very close scrutiny of State purposes in this arena, which sometimes cannot be satisfied.

Ms. **SULLIVAN**. If I could just add, Senator, briefly, *Meyer* and *Pierce*, as Professor Richards so clearly stated, said we have a basic right, to quote *Meyer*, "to marry, establish a home and to bring up our children." And the State cannot interfere with those rights.

Ever since those cases, the Court has said those personal liberties are protected; economic liberties protected by that same McReynolds Court are not as important.

Judge Bork disagrees with that distinction. He says a married couple in its bedroom has no more constitutional rights than a smokestack operator who is polluting the air. He says personal liberties are not more important to us than economic liberties. The Supreme Court has said the opposite, as Professor Richards said, and that is why *Meyer* and *Pierce* are still vigorous when other economic cases from that era are not.

Senator KENNEDY. Thank you very much. My time is up, Mr. Chairman.

The CHAIRMAN. The Senator from Wyoming, Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman. I appreciate that.

I listened to your opening remarks, and I do welcome you to the hearings. It is, again, fascinating for me to hear some of really the finest professors and scholars and academicians in the United States on both sides of the issue, with one exception: a gentleman from Arizona who came down very harshly on the personality and the activities of Judge Bork. I have not heard anybody yet say that Judge Bork was not a remarkable intellect, dazzling piece of work in the way his thought processes work, a man of integrity, a man of honesty.

And then what really disturbs me, and this is one who love the law and practiced law for 18 years and did everything from reorganize railroads to replevin one-eyed mules. I am puzzled, really puzzled how, after you have said all those things about Judge Bork—and forget the politics of it; that is very obvious, on both sides, and the advertising campaigns on both sides, forget all that.

The question is, do you really feel good about just punching around in a law review article from 1971, or picking a statement about the bedroom, and pollution, and smokestack, which I have heard now 43 times since I have been here?

And sterilization of women, and sterilization of men. And a poll tax, i.e., meaning racism. And do you really feel good about that, when you are so bright, and so articulate, that you have to go back in with a scalpel to mess around, and just find those little inflammatory flame points of Judge Bork, and leave out, as intelligent people, leave out amicus brief after amicus brief where he protected the rights of minorities and blacks, and women—a whole history of that—and opinion after opinion—135, or 106, depending on whose figures you are using—that were never overturned by the United States Supreme Court, and some 400 opinions—and the only way you get an opinion in real life is to have a majority of your brothers and sisters on the court go with you.

So here are these opinions of Judge Ginsburg, joining him in 91 percent of his activity, and Ab Mikva joining him in 72 percent, or 78. My figures may be a little wrong. Pat Wald, 72 percent, 78 percent. And then exhaust your efforts, as intelligent people who know so well, that there is two sides to every single case, and to bring up things like the fact that he is against the family.

He explained that case so beautifully. I hope you heard that, as Judge Bork seemed like he could explain it rather lucidly, since he was the one speaking on it, and not just go to that kind of argument, kind of get it up on another level which would be more, it seems, appropriate, and more responsible, and more hearable.

That is my question.

Ms. KAY. Senator Simpson, may I respond to that?

Senator SIMPSON. Yes. I would like that.

Ms. KAY. Thank you. I think what we are talking about today is a point at which Judge Bork has not changed his position, and it is not necessary to look around for things that are inconsistent, because he himself has been very consistent.

He has arrived at a clear and coherent judicial philosophy that, as Professor Sullivan points out, puts him outside of the mainstream of the American judiciary on the privacy issue.

He has continued to adhere to that position. He did so as a sitting judge on the D.C. circuit. He has done so consistently throughout these hearings.

As recently as the very last morning of his testimony, under questioning by Senator Specter, he declined to state how he would respond to a new case under the *Griswold* line of precedents.

I think that is if we look only at his published record, including the very most up-to-date utterances, we have to conclude about the *Griswold* reasoning in a future case, that, one, he would vote to construe it as narrowly as possible. He did that in *Dronenburg*.

Two, he would not vote to expand it. He did not do that in *Franz*. And three, that freed from the restraints that bind a lower-court judge, he would probably vote to overrule it.

I think that is fair to conclude from the record.

Senator **SIMPSON**. Well, Mr. Chairman, again, time constraints——

The **CHAIRMAN**. That is all right. Since all three were mentioned and characterized——

Mr. **RICHARDS**. May I also make a comment on this?

The **CHAIRMAN** [continuing]. You can each comment, if you would like.

Senator **SIMPSON**. I would like that. Thank you.

Mr. **RICHARDS**. Judge Bork, when he came here, put his present approach to the article, and his views on this general arena, by saying it is possible there might be an alternative way to justify these results, but as I read his attitude to this whole general area, he has identified a logical possibility.

It is possible, he said, there might be an alternative way, but the question, it seems to me, for the Senate and the American people is, is there any probability that he himself would actually protect these rights?

And I think, not only from his most recent writings, but if you look at his general attitude in this arena, including things he said in these meetings, it is very doubtful, indeed.

He said, for example, he placed much emphasis on reasonableness as a test. The suggestion is under a general reasonableness standard you might strike down anti-contraception, or perhaps abortion laws.

But reasonableness is the weakest possible test, and against that, he has this extremely powerful theory which he has reaffirmed on the bench in *Dronenburg* and elsewhere, of moralistic majorities to have their way. He thinks that is a very powerful feature of our democracy.

If you put together this very weak conception of reasonableness, this extraordinarily powerful theory of majoritarian moralism, there is no room for privacy.

Privacy is a right against a certain kind of majoritarian moralism which is unjustified. These are his interpretive convictions, Senator Simpson—and I take them as interpretive convictions—I mean, honest views. There is no room for privacy in his jurisprudence, and I think that means these rights are at threat, and that is something I think the American people and the Senate must attend to in the confirmation process.

The CHAIRMAN. Professor Sullivan.

Ms. SULLIVAN. Very briefly, I agree, Senator Simpson, we did not have to look with a scalpel for Judge Bork's views on the right to privacy. We can all see them with the plain unaided eye. They are as plain as day, and have been plain in these hearings the last 2 weeks, and I think we have given a fair rendering of them.

The second point. You said there are two sides to every issue. Well, I beg to differ with you slightly. On the issue of the scope of the right to privacy—how far does it go, what does it protect, what is really private, is abortion a private matter, is sex a private matter between consenting adults, how far does it go? On the scope of the right to privacy, good and reasonable, fair-minded men and women differ greatly, and in good faith. That has happened, it is happening now, and I expect it to continue as long as there is a right of privacy to argue about.

But there has been no disagreement on the Supreme Court, for 75 years, that there exists some right to privacy, and it is that disagreement of Judge Bork that we are focusing on.

There are two sides to the issue on its scope, but there have not been, in our jurisprudence, two sides of the issue as to its existence, and that is what puts Judge Bork outside the mainstream.

Senator SIMPSON. Well, Mr. Chairman, Judge Black had a thought on that, and Judge White had a thought on that on *Roe* v. *Wade*, so let's kind of keep the old track open for everybody.

Ms. SULLIVAN. On the scope.

Senator SIMPSON. Yes.

The CHAIRMAN. On the scope but not on the existence.

Ms. SULLIVAN. Not on the existence.

The CHAIRMAN. I think this is such a fundamental point, that if the Senator wishes to take more time to pursue it, I would be delighted to give it off the Chairman's time in a future questioning period.

But I want to make it clear, that as I understand what Judge Bork said, he disagreed with the existence of the a generalized right to privacy, and in that sense he is all by himself in the line of Justices for the past 75 years.

Black, and everyone else, at some point acknowledged the existence of a right to privacy. They disagreed on the application of that right, and the scope. Judge Bork, as I understand it, and as I have read, and as I listened and as I questioned, is the only person to come before this committee in my 15 years, and the only person who has consistently denied the existence of such a constitutionally protected right.

That is the debate. If I am wrong about that, I would like to be corrected now, and I would yield on my time in the future. I will refrain from asking questions of future witnesses, this is so fundamental a point.

Senator SIMPSON. Mr. Chairman, it is, indeed, and in one sentence let me say that Judge Bork—and he said it so clearly—his problem with the abstract constitutional right of privacy is that it has no inherent limits. That is what he was saying. Homosexual sodomy, or bestiality in your bedroom. Those are the things he was talking about, and that is what he was talking about as an academician. And so I hope we can keep that together.

And if you want to read the language of Justice Black, I urge you to do so again, as to what he said in that case of *Griswold*, and read the decision of Justice White.

Somewhere, the right to privacy does not mean you just lay around and shoot up, and do that to the rest of the American public, and is that a right of privacy, to just—you know—do that? I do not know?

The CHAIRMAN. The answer, if I——

Senator SIMPSON. Is bestiality, homosexuality—that is what he was talking about. Let's kind of keep honest here.

The CHAIRMAN. Let me make one more point, and I have not done this the entire hearing, but this is such an important point.

You are correct that Judge Bork said that there are no inherent limits. Ergo, he has concluded, because he cannot find a way to put limits upon it, like other judges have, because he does not want to be subjective, which he says he rejects out of hand and worries about judges. Because he cannot place—there are no inherent limits—he chooses to deny the existence of the right in the first instance.

That is the point. No one here argues, no Justice, no Senator argues, that there are not limits to the right of privacy.

No one argues that you have a right to beat your husband or wife in private. No one argues you have a right to shoot up in private. No one. I think they are—as we used to say when I practiced law—not as long as you—but they are red herrings. They beg the question.

So, I want to get back to, he does say there are no inherent limits, but because he says he does not want judges to be subjective, which would require them to place limits on the existence of a right, he chooses to avoid the subjectivity, in fairness to him, on the part of judges, by denying their right to recognize that such a fundamental right exists in the first instance.

For if there is no fundamental right, then there are no gradations. There is no need to choose among gratifications. There is no need to make judgment calls, which suits his overall philosophy.

That is the point, in this Senator's view, and I promise I will not interrupt like this again. As I said, in 10 days or more I have not done it, but this is such a fundamental point, I feel compelled to do so.

Unless the Senator from Wyoming wishes to speak, the Senator from——

Senator SIMPSON. Well, you know, I would love to have a half hour set aside maybe at the end, so that we could discuss the right to privacy among the members of the committee. I think that might be well worthwhile.

The CHAIRMAN. That may be the appropriate way to do it.

Senator SIMPSON. I can see the intensity of your feeling about it, and all I am saying is that somewhere, along the line, that is going to be subjective, too.

The CHAIRMAN. Clearly.

Senator SIMPSON. What the moral majority's right to privacy is, and what the minority within the minority's right to privacy is.

Now that is the way it is going to be, and I think that we want to remember, that if we are just going to say that this abstract right is limitless, and that is—you know—what he is guarding against, then it could be extremely dangerous. That is what he is saying. And somebody else is going to do the selection for you and me, at some point in time, unless it is stationed and anchored within the Constitution, and that is all he is saying.

The CHAIRMAN. I think you have framed it well. In this Senator's view, the only thing worse than it being limitless is for it not to exist.

I yield to my friend from Ohio.

Senator METZENBAUM. Thank you. I found that discussion very interesting, and I commend both the Senators and the professors because I think it was superb.

Professor Sullivan, you commented on Judge Bork's views on sterilization laws. I must tell you that I asked, as you probably know, Judge Bork about that subject, and the choice that was given to the women by the West Virginia company.

And his response has played on my mind ever since then, when he said: "I suppose they were glad to have the choice—they apparently were—that the company gave them. The choice to be sterilized, or to lose their jobs."

I must be frank with you, that I think every one of us relates oftentimes to issues that come before this body. Maybe all of us in our everyday lives do. And as I thought about this question of forcing a woman to be sterilized, I thought about my four daughters, and the fact that sterilization would have precluded them from having the grandchildren that I love so dearly. And what it would do to a woman to be forced to make that decision.

I am frank to say, I thought that the decision showed an insensitivity to women generally, and to the idea of reproductive choice more specifically.

When I asked Judge Bork about this decision, he said that, quote: "It is simply upholding a federal agency to which we hold deference." End of quote.

And I ask you as one who addressed herself to this particular decision: is that an adequate explanation of his decision, or was he just deferring to the agency, or was he actually making a statement on the issue?

Ms. SULLIVAN. Well, Senator Metzenbaum, I do recall quite clearly your exchange with Judge Bork on this topic, and let me say a couple of points in fairness to Judge Bork.

This was not a constitutional case, the *Cyanamid* case. It was a case about interpreting statutes that the Congress has passed, safety statutes for workers, and their implementation by the agency. So this is not like the *Skinner* case where we had the State of Oklahoma sterilizing Mr. Skinner.

This is a case where we had a private company, regulated by the Congress, putting workers to a choice of whether they would continue taking lead poisoning into their bodies that might endanger their future fetuses, or whether instead they should just sterilize themselves, and save themselves the future problem.

So, in fairness, it is not a constitutional case, but what I think we can draw from it is at least this much. Judge Bork did not see the fundamental right to make our own decisions about procreation—whether we are going to have children—did not see that as creating a special need for sensitivity in this case. He did not see that fundamental liberty to procreate as demanding a reading of the statute that would have protected these women.

After all, getting sterilized is not just a safety precaution like putting on a gas mask when there are fumes in the factory or using an extra ladder when you are climbing up a height.

Getting sterilized, as Justice Douglas said for the Court, unanimous Court, in *Skinner* v. *Oklahoma* in the 1940's—there is no redemption from that. Once sterilized, there is no redemption.

And I think finally, Senator Metzenbaum, to see it as a choice, an act of free will—sterilize or feed my children—I think we all know that that is not a truly free choice, not one we would exercise if we had all the resources in the world, as those five women in the *Cyanamid* case did when faced with that choice.

So I would preface my remarks by saying it was not a constitutional case, we cannot say this proves Judge Bork is for sterilization. He is not for sterilization. And we cannot say Judge Bork believes the State can sterilize. He has never said that.

All we can say from *Cyanamid*, though—and it is an important point—is that he was not sensitive in his reading of the statute to the importance of our powers of child-making, our right to procreate, when he read that statute, and that is a sensitivity I would hope that a Justice of the Supreme Court would have.

Senator **Metzenbaum**. Mr. Chairman, I will have no other questions, but I want to put into the record a memorandum of September 28, 1987, from the General Counsel of the AFL–CIO to me on the facts in that case.

The memorandum demonstrates, contrary to what Judge Bork asserted to the committee, that there were alternatives to the policy Judge Bork approved. And let me just quote, briefly, from that memorandum.

Quote. "In spite of Judge Bork's explanation, the actual factual and procedural record of the *American Cyanamid* case, as it was presented to him, does not fairly support the conclusion that the employer had no other reasonable alternatives. To the contrary, the union petitioners, and the Secretary of Labor had consistently argued in the proceedings before the Occupational Safety and Health Review Commission, that other non-injurious methods of protecting fetal health, such as medical monitoring, safety training, birth-control counseling and monitoring, and use of respirators, could effectively reduce the lead levels so as not to cause harm to a fetus." End of quote.

[Memorandum follows:]

American Federation of Labor and Congress of Industrial Organizations

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September 28, 1987

The Honorable Howard Metzenbaum
140 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Metzenbaum:

This letter and the memorandum attached hereto are prompted by your discussions with Judge Robert H. Bork concerning his decision in Oil, Chemical and Atomic Workers International Union v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984), during the Judiciary Committee's sessions of September 18 & 19, 1987 on Judge Bork's nomination to be an Associate Justice of the Supreme Court of the United States.

Since that case involved an international union affiliated with the AFL-CIO, we asked the union's counsel for the papers in the court of appeals and, on the basis of our review of those materials, prepared a memorandum for your consideration -- and should it prove, in your judgment, to be of any value, for the consideration of your colleagues on the Committee as well -- comparing Judge Bork's testimony with the legal points made in the union's presentation to the court.

Sincerely,

Laurence Gold
General Counsel

Attachment

Memorandum on Judge Bork's Opinion and Testimony Concerning the American Cyanamid Case

On Friday, September 18 and Saturday, September 19, 1987, Judge Bork was questioned by a number of Senators about the opinion he authored in Oil, Chemical and Atomic Workers Union v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984). That case held that the American Cyanamid Company had not violated the Occupational Safety and Health Act (OSHA) by adopting a policy which provided that every woman employee between the ages of 16 and 50 in a certain department had to submit proof that she had been surgically sterilized or else she would lose her job. No other options were given, nor were any exceptions allowed.[1] Because lead levels in that department's air were so high as to possibly harm fetuses, American Cyanamid stated -- and Judge Bork accepted -- that this policy was a reasonable means of assuring that there was no chance of a pregnant employee exposing a fetus to lead.

As we now explain; an examination of the briefs and record of the proceeding in this case reveals that, both in his Senate testimony and his written opinion for the court, Judge Bork characterized the factual and procedural record in this case in such a way as to make the company's case appear far more sympathetic than a fair reading of the entire record justifies. Judge Bork implied that his dismissal of the challenge to the company's sterilization policy was based on the view that the company had no options other than to protect against fetal harm by excluding all potentially fertile women from these jobs. More specifically, his opinion and his testimony clearly suggested that it was undisputed that no feasible alternatives to this sterilization rule were available to the company. However, an examination of the briefs and record of the case shows that this very issue -- whether any such feasible alternative existed -- was in fact one of the most hotly disputed issues in the case, and had not previously been the subject of any finding in the administrative decision under review.

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[1] The policy was so inflexibly applied that one female employee was told that she would have to be surgically sterilized even tnough her husband had already been surgically sterilized himself. Petitioners Brief (Pet. Br.) at 4.

I. Judge Bork's Explanation of the Case

All agree that the two provisions of OSHA relevant to this case are as follows: First, the general duty clause, which requires that,

> Each employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." (29 U.S.C. § 654(a)(i)).

And second, the statement of purpose and policy of the Act, which was designed to guide intepretation of the general duty clause:

> "The Congress declares it to be its purpose and policy . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions. . . ." (29 U.S.C. § 651(b)).

As we read Judge Bork's answers to Senators' questions, he decided that American Cyanamid did not violate these duties in large part because the company could not reduce the lead levels to a point that was safe for fetuses, and thus, had no choice but in some way to rid its department of all women who might become pregnant. In essence, Judge Bork said that the company had to choose between two undesireable options: it could either require sterilization as a condition of continued employment, or it could adopt an even more extreme policy of prohibiting all women employees of childbearing age from working in the department at all.

This view was clear in his first response to Senators' questions on the case, where Judge Bork quoted from his opinion to explain that this was the choice the company faced:

> "[A]s I wrote:
>
> > 'It is important to understand the context in which this case arose and the task that it has set for this court. American Cyanamid found, and the Administrative Law Judge agreed, that it could not reduce ambient lead levels in one of its departments sufficiently to eliminate the risk of serious harm to fetuses carried by women employees.
> >
> > 'The Company was thus confronted with unattractive alternatives: it could remove all women of child-bearing age from that department, a decision that would have entailed discharging some of them, and giving others reduced pay at other jobs; or the company could attempt to mitigate the severity of this outcome by offering continued employment in the department to women who were sterilized....' (quoting 741 F.2d at 445).
>
> * * *

> "[M]y opinion was narrow, ... It noted -- ... that the case might be different if the employer had offered the choice of sterilization in order to maintain an unlawfully high lead level. But the fact is the company could not get the levels down, and the company was charged only because it offered women a choice.
>
> * * *
>
> "So the case is simply about offering women who did not want to be discharged or sent to lower-paying jobs a choice. That's all it was about." (Fed. News Service Transcript (Tr.), pp. 21-1 - 21-2 (9/18/87)).

Later, Senator Metzenbaum protested:

> "Congress said no hazards in the workplace, but you wrote an opinion which said it's okay for a company to achieve safety at the expense of women by preventing its female employees from ever having children. (Tr. p. 22-1 (9/18/87)).

Judge Bork explained that:

> "[T]he company did not achieve safety at ... the expense of women. They could not get the lead levels down." (Id.)

And, when Senator Biden specifically asked: "[H]ad you, . . . concluded that eliminating lead was economically feasible . . . then the company would have lost and the plaintiffs would have won?" (Tr. 32-1 (9/18/87), Judge Bork agreed. (Id.).

The following day, in colloquy with Senator Hatch, Judge Bork reasserted even more emphatically that the Company simply had no more satisfactory options:

> "This was a case with no satisfactory solution for anybody. I mean there was nothing to do. There was no satisfactory way to solve it.
>
> * * *

> "So the company and the workers were both faced with what I called in my opinion, a most unhappy choice.
>
> * * *
>
> "I would not want to be an official of that company trying to make that choice." (Tr. 31-2 - 32-1 (9/19/87)).

III. What the Record of the Case Actually Showed

In spite of Judge Bork's explanation, the actual factual and procedural record of the American Cyanamid case, as it was presented to him, does not fairly support the conclusion that the employer had no other reasonable alternatives. To the contrary, the Union Petitioners, and the Secretary of Labor, had consistently argued in the proceeding before the Occupational Safety and Health Review Commission (OSHRC) that other, non-injurious methods of protecting fetal health (such as medical monitoring, safety training, birth control counselling and monitoring, and use of respirators) could effectively reduce the lead levels so as not to cause harm to a fetus. This was clearly explained in the briefs submitted to Judge Bork and the other members on his panel:

> "OCAW and the Secretary [of Labor] offered in the Commission proceedings to present evidence to establish that Cyanamid could have provided protection to fetuses without requiring the surgical sterilization of employees, and they sought discovery to refute Cyanamid's opposing contentions. But because the ALJ, at Cyanamid's urging, disposed of the case by adopting the threshold position that the sterilization rule was not a hazard cognizable under the Act, a factual record was not made on this seriously disputed point." (Pet. Rep. Br. at 20; see generally Petitioners' Brief (Pet. Br.) at 13, 40-41; Pet. Rep. Br. at 19-27).

Precisely because the petitioner unions were never given the opportunity to present evidence to establish this point, the unions argued that the Court of Appeals should remand the case to the OSHRC for an evidentiary hearing. And, in support of this argument for remand, their brief explained that in an earlier decision, the D.C. Circuit Court of Appeals had reviewed and affirmed a finding by the Occupational Safety and Health Administration that precisely these sorts of non-injurious measures that they raised could be successful in protecting fetuses and this allowing women to work in the lead industry. See United Steelworkers of American v. Marshall, 647 F.2d 1189, 1257 (1980).

Without even acknowledging that this argument was made by the Union and the Secretary, Judge Bork's opinion affirmed the dismissal of the case. In both his opinion and his testimony, he simply passed by petitioners' repeated contentions that, if given a chance, they could prove that non-injurious fetal protection methods were available as an alternative to the sterilization policy. Petitioners Reply Brief (Pet. Rep. Br.) at 24.

It is a basic legal rule that a claim cannot properly be dismissed until a party has had an opportunity to prove its contentions on the relevant facts. But Judge Bork's decision foreclosed that opportunity in this case.

Senator **Metzenbaum**. Thank you, Mr. Chairman.

The **Chairman**. Thank you very much. Senator Grassley.

Senator **Grassley**. Thank you, Mr. Chairman.

I have listened with interest to those arguments advanced by people who promote the view of a generalized right to privacy, and I conclude that this generalized right is little more than a loaded gun that is laying right there on the table, just waiting for some judge—he, or she—to pick it up and use it as they see fit.

It seems very undefined, without limits or guidelines for the courts on how to interpret it, and, consequently, no guidelines to citizens on how to order their lives according to this new general right.

Now for those of you who say that no Justice in 75 years has put any limit on this generalized right to privacy, I think we ought to look at what Justice Black said about that in *Griswold*.

"The law—quoting Justice Black—the law is every bit as offensive to me as it is to my brethren, who, reciting reasons why it is offensive to them hold it unconstitutional. But I cannot subscribe to their conclusion that the evil qualities they see in the law make it unconstitutional. The Court talks about a constitutional right of privacy as though there is some constitutional provision forbidding any law ever to be passed which might abridge the privacy of individuals."

"But there is not," he says. And then going on: "Privacy is a broad, abstract, and ambiguous concept that can easily be shrunken in meaning, but which can also easily be interpreted as a constitutional ban against many things other than searches and seizures."

"I get nowhere in this case by talking about a constitutional right of privacy as an emanation from one or more constitutional provisions. I like my privacy as well as the next—Justice Black says—but I am nevertheless compelled to admit that government has a right to invade it, unless prohibited by some specific constitutional provision."

Now Justice Black, who was appointed by Franklin Delano Roosevelt, obviously he is known as a great defender of individual liberty. You would all agree with that, wouldn't you?

Ms. **Sullivan**. Certainly.

Ms. **Kay**. Absolutely.

Mr. **Richards**. Certainly.

Senator **Grassley**. I think we would also have to agree that he is lucky that he is not before this committee today because he probably would not be confirmed.

Justice Stewart, writing in the same *Griswold* case said, and I want to quote: "I think this is an uncommonly silly law, but we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the Constitution, and that I cannot do. With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this court."

Now, for this panel, I would like to try to get a handle on where you think that this general right of privacy might take us, where it extends to, and if you could, I would like to have a yes or no answer.

For instance, is prostitution protected by your generalized right of privacy? That could be interpreted as being majoritarian moralism that you talk about, but is that protected by the generalized right of privacy?

Mr. RICHARDS. Senator, I would like to distinguish two questions, if I may.

Senator GRASSLEY. Well, I would like to have a yes or no answer.

Mr. RICHARDS. Well, I think I would be able to answer if I could draw this distinction because it would help you understand my views.

It seems to me there is an abstract question of principle in American public law. Is there a right of private life associated particularly with marriage and child-bearing, protected from a very heavy burden of—which is protected against State intrusion unless there is a very heavy burden of justification.

And it seems to me the dominant view in our tradition, historically, textually and the like, is that there is such a right, and, indeed, that *Griswold* is a paradigmatic example of a statute which lacks the requisite justification and was probably struck down by the Supreme Court on that ground.

Now lawyers, and Americans disagree widely on the scope of that right, and on the grounds on which it might be abridged, and there is a range of different views which people take on that issue.

I mean, some of us might include homosexuality in the scope of privacy, might have problems including other things.

Senator GRASSLEY. Is homosexual marriage included in your right of privacy? I mean, it seems to me like we have got to get to a point, if Judge Bork is so bad, and you espouse that he is too narrow on the right to privacy, then how far does your point of view take our society away from the community standards that have judged a lot of the political decisions that are made in this country?

Ms. SULLIVAN. Senator Grassley, I think—if I may interject.

Senator GRASSLEY. Surely.

Ms. SULLIVAN. If the question here were whether Judge Bork sees the right of privacy as wide enough for us, as encompassing all the things we personally might think ought to be private, none of us would be here. Because we all agree that reasonable men and women can disagree about the scope of the right to privacy.

Some might think prostitution involves the marketplace. Commerce. That is not sex for love, it is sex for money, and therefore it is not private. Others might disagree.

That is not why we are here. Why we are here is because Judge Bork is not asking us to get to that line-drawing issue. He says there is no right of privacy so you do not get to the line-drawing issue.

Now as to both Senator Simpson's and Senator Grassley's remark that this right of privacy is uncabined and limitless and as wide as the sea—well, there is just no evidence for it.

The Supreme Court has not taken it to——

Senator GRASSLEY. Well, what are the limits? What are the limits as far as you are concerned?

Ms. SULLIVAN. One example given by the Supreme Court two terms ago was it did not extend by—a five to four decision—it did not extend the right of privacy to consensual adult homosexual intimacy.

Senator **Grassley**. Why, because of community standards?

Ms. **Sullivan**. Because in good faith, trying to draw the line as is the appropriate task of the Supreme Court—if they stopped engaging in line drawing they would be as out of work as the NFL. Line drawing is their business.

They drew the line, in large part, because they could not identify that with the traditions of our country, the values underlying our people at the time of the framing of the Bill of Rights.

Senator **Grassley**. And the Supreme Court is not the only one making that determination in our society, under our checks and balances system of government.

Ms. **Sullivan**. I am trying to give you an example, sir, of the limits the Supreme Court has drawn. It is not limitless. The Supreme Court has not said everything in the world that any academic might invent is private.

They have said look to our traditions, look to our values. Some of us may disagree with that decision. That is not why we are here. That is not why we are here.

We are here because we think it is dangerous to deny the existence of the right.

We fully accord anyone his right to argue about its scope.

Senator **Grassley**. Well, Mr. President, or, Mr. Chairman, I think my——

The **Chairman**. That is all right. I like either address. The first one does not count for much anymore for a while, but the second, hopefully.

Senator **Grassley**. You know, we could go on—and I am going to conclude. I am not going to ask any more questions.

The **Chairman**. That is all right. This is important.

Senator **Grassley**. But I could ask the same questions about bigamy and polygamy. They have mentioned homosexual acts. Incest, I asked of Professor Hufstedler last week. Hard drugs have already been brought up.

But I think that particularly this year, in the bicentennial of our Constitution, we ought to heed the words of Jefferson on the role of courts in a democracy, because his saying puts the proper perspective on this whole conversation, the whole debate we are having here this morning.

He says, "Our peculiar security is the possession of a written Constitution. Let us not make it a blank paper by construction."

I urge people to consider the dangers of turning the Constitution into such a meaningless blank document. After all, an interpretation that permits the creation of new rights out of thin air can be just as easily used to take away those fundamental rights.

The **Chairman**. Thank you, Senator. The Senator from Arizona. Senator DeConcini.

Senator **DeConcini**. Mr. Chairman, thank you.

This area is one of the greatest concerns I have because I draw my own lines on the right of privacy and oppose the *Roe* v. *Wade* case for whatever basis it was developed on the right of privacy. In reading some of the opinions there is reference to that.

But I feel very strongly, as you do, Ms. Sullivan, that it is important that at least you would be able to recognize that the right of privacy is in the Constitution, as the Supreme Court has.

And in your testimony, and also, Professor Kay, in yours, and perhaps yours, Mr. Richards—I cannot recall—you indicate that current and former members of the Court have recognized this right to privacy, even current members such as Scalia and O'Connor and Rehnquist, certainly conservative, "mainstream conservative" members.

I wonder if it is possible for you to—maybe not within 3 or 4 minutes—supply us some examples of that in cases, or, if you would care to attempt to start till the red light goes on there, because I think it is important.

It is going to weigh heavily on me, that area, and I do not know if he is out of step with these other judges. I have been told that, but I would like to see some examples, if you can.

Ms. KAY. Senator DeConcini, just for a moment, and then I will yield to Professor Sullivan.

I think the point is not so much whether his outcome would be different from those of other judges.

Senator DECONCINI. I know that. I am talking about the concept or the capability of finding it there, and there is no question that he made it very clear that it is not there. It is not there in the ninth amendment. It is not there in the 14th amendment. It is just not there.

Both of you I think stated that present members of the Court, and former so-called conservative members of the Court, though they might not have applied it, say, to abortion, they found it in the Constitution.

Well, I find it in the Constitution just as clear as those lights are shining down on you, but I draw my own line, and whether somebody agrees with that, that is up to them, and I do not force my views on them, but I am interested in those examples of where these sitting members, particularly, so-called mainstream conservatives, vary from Judge Bork.

Ms. SULLIVAN. I would be happy to provide a few examples, if I might, Senator DeConcini.

Senator DECONCINI. Would you? Okay.

Ms. SULLIVAN. Let's take Justice White, an articulate, passionate dissenter from *Roe* v. *Wade*, the abortion case.

Justice White says the right of privacy does not go that far. Abortion is not a matter of a woman in isolation. It involves the interest of a potential third party and that is why it is not private.

Senator DECONCINI. What about Rehnquist?

Ms. SULLIVAN. Well, let's take what Justice White has said. He signed *Griswold*, the case that Judge Bork has consistently criticized.

Senator DECONCINI. Sure.

Ms. SULLIVAN. He wrote his own concurrence. He said I base this on liberty, the due-process clause of the 14th amendment, but there is a liberty right for married people to use contraceptives in their bedroom.

He signed that. He signed the subsequent case upholding the right of access to contraceptives.

Senator **Leahy**. He signed the which case?

Ms. **Sullivan**. Justice White concurred in the judgment in *Griswold,* writing that he found married persons' use of contraceptives to be a substantial part of marriage, and marriage and its intimacy is to be protected by the liberty clause of the 14th amendment, reasoning very similar to Justice Harlan's.

Senator **DeConcini**. What about Justice Rehnquist. You mentioned him.

Ms. **Sullivan**. Justice Rehnquist, just to take a recent example, just last summer, at the end of the term, signed on to Justice O'Connor's opinion for all of the Justices of the Court, that you could not deny—a State could not deny prisoners the right to get married. Why?

Well, they may be prisoners, but marriage is one of the fundamental civil rights of man, quoting Justice Douglas from the *Skinner* case. They all signed that opinion. They all said you cannot take that——

Senator **DeConcini**. Based on a right of privacy, referring to the *Skinner* case?

Ms. **Sullivan**. A right of privacy based in the liberty clause of the 14th amendment, read in the light of the ninth amendment's great reminder, that we did not give all our rights away to government when we formed the Constitution. We saved them.

Senator **DeConcini**. So that is a clear example as to Rehnquist, O'Connor, and Scalia all agreeing to that.

Ms. **Sullivan**. Justices Scalia and O'Connor also signed that decision in *Turner* v. *Safley.*

Senator **DeConcini**. That is what I wanted. What case is that?

Ms. **Sullivan**. *Turner* v. *Safley,* a case from 1987—the 1986 Term.

Senator **DeConcini**. Thank you.

Ms. **Sullivan**. And just as to Justice Black, to go back in time for a moment. Of course Justice Stewart, although he initially disagreed with *Griswold* did sign on to *Roe.* His doubts may have been assuaged in the years that the Court was not going to take the right of privacy to endless limits—the prophecy of doom that Senator Grassley read us a moment before from Justice Black.

Justice Black himself also signed on to the right of privacy at least three times. He signed onto Justice Douglas' opinion in *Skinner* v. *Oklahoma.*

Senator **DeConcini**. *Skinner.* And did he base that on privacy, too?

Ms. **Sullivan**. He signed it. We do not know what he was thinking.

Senator **DeConcini**. He did not write anything——

Ms. **Sullivan**. The decision clearly has both an equality and a privacy component.

He signed onto the opinion of Chief Justice Warren for the Court in *Loving* v. *Virginia,* holding that it was not only race discrimination to bar interracial marriage, but that a ban on interracial marriage violates the liberty, the privacy interest in being married to a person of your choice, not the State's.

When Justice Black signed those opinions, he could easily have written a concurrence. He could have said I am doing this only for a different reason. Justice Stewart did that in *Loving*. He said I am just doing this because it is race discrimination. I do not sign on to that little "liberty stuff" at the end.

Justice Black did not do that. He was a man of close reading. If he had thought that it was thoroughly beyond the pale to sign onto the right of privacy, we can bet he would have written separately in those cases, and of course *Bolling* v. *Sharpe*, another case——

Senator DECONCINI. Well, thank you. That is helpful to me, and any other information you want to supply the committee will also be helpful to this Senator. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

I would like to get your views on a somewhat different question. I have heard your testimony on privacy. I have expressed my concerns about that. We have talked about the first amendment and we have talked about equal protection.

There is another parameter, perhaps, to these confirmation hearings, looking at Judge Bork from a different perspective, and that may be that he has in fact, as Professor Kurland said, campaigned from podium to podium to become a Supreme Court nominee, and that he has a very powerful intellect and might make an enormous contribution to the Supreme Court, if confirmed.

Chief Justice Burger has said, or been quoted as saying that he is the best-qualified nominee to the Court in 50 years. And as I go back over the Justices of the Court—and there are powerful intellects on the Court today—but it may be all the way back to Cardozo, when we had a State court of appeals judge come from New York with the great decisions he handed down in *Falsgraf* and *Buick* v. *McPherson*, and other cases. Or it may even be all the way back to Holmes who had been on the Supreme Judicial Court of Massachusetts.

And that Judge Bork has an enormous intellect and really great potential on the Court. And there is the other aspect which is not an irrelevancy, although perhaps we should take the nominees one at a time, as to what will happen to the nomination process if Judge Bork is not confirmed?

What will be the alternative? We have a President who has a disposition to nominate a conservative, and many say that is his right, and there is a certain discretionary range for a presidential appointment, perhaps. That is up to each individual Senator to evaluate.

But why not Judge Bork? I think that people would have been surprised in the abstract to see Chief Justice Rehnquist sign onto the *Turner* opinion, and I discussed that with Judge Bork when he was here a week ago Saturday.

Be surprised to see Justice Scalia sign on to the *Turner* opinion in view of Justice Scalia's statement about original intent, and the status when he came to the Court.

And we know the great surprises of Justice Black, or Justice Tom Clark voting against Truman on the steel mill seizure.

Why not Judge Bork? What about the potential advantages of having a man of his powerful intellect coming to the Court with the tradition that has been present on the Court for people following a different path than you might expect?

Professor Richards, I notice you straining at the leash. Why don't you start.

Mr. Richards. Well, I think it is not the intellectual caliber of the man which troubles us. It is obviously considerable. But it is his attitude to law, and particularly to American constitutional law.

The great judges you cited—Holmes, Cardozo—had the most profound respect for the American constitutional tradition. They were great legalists. Arguments according to principle were profoundly important to them. They shaped our culture in that kind of way.

Judge Bork has taken a highly abstract intellectual attitude to what it is to interpret the American Constitution, and he has argued for it extremely vigorously. And his arguments, it seems to me, are not in the range of what you would call reasonable debate about the meaning of the Constitution.

We all disagree about the proper play of text, history, political theory, and judicial precedent.

Senator Specter. With all due respect, Professor Richards, who are you or I to say that Judge Bork's positions are unreasonable? You have some real legal scholars who have come forward here, and you have had Judge Bell; you have had Lloyd Cutler; you've had people who are well within the range of accepted legal standards

Why the conclusion? Why should we accept your generalization or perhaps mine as to Judge Bork's being beyond or your generalization? Let's take yours.

Mr. Richards. Well, because of the things he seems ready to read out of the tradition on grounds that seem quite baseless. It seems to me the two things which we look for in a Supreme Court Justice is an understanding of the rights of the enumerated and unenumerated in our tradition and a capacity to vindicate them by arguments of principle in a courageous and independent-minded way. That is what we admire, to hold us accountable to these great principles which the culture is about.

Judge Bork has an extremely narrow conception of rights, both enumerated and unenumerated. That is clear from what we've seen in many areas.

Senator Specter. How about *Ollman* v. *Evans and Novak*? Isn't that a very forceful illustration of Judge Bork taking a first amendment issue and making a very good interpretation, progressive interpretation as you would consider it?

Mr. Richards. In that area, but, of course, his views on privacy remain extremely narrow, and it seems to me nothing is more important to the American people or it would seem to me to the Senate than a judge's capacity to understand, to have a rich and complex and vigorous conception of the rights our tradition protects and a capacity to hold us accountable to principle, and there is real doubt about both of those things.

Senator Specter. Well, I'd like to go on, but my time is up, and we do have a lot of witnesses. I bring up the *Ollman* case only as illustrative of a surprise by Judge Bork, and we talk about *Turner* as a surprise by some of the Justices who signed on.

We have a Judge Bork in *Dronenburg,* and we have his court opinion on privacy, and I understand what it is. We have the power of his intellect and that is a question that I was interested in your comments, and I thank you for them.

Thank you very much.

Ms. KAY. Senator Specter, could I add just one sentence to Professor Richards' answer on that point?

The CHAIRMAN. Surely.

Ms. KAY. I'd just like to say that all of us as law professors always have to judge our graduates on their intellectual prowess, and I think on that measure as you've said, Judge Bork is clearly an intellectual strength.

But intellect alone is not sufficient to make a great jurist. There has to be, in the words of other witnesses who've appeared before you, judgment, wisdom and sensitivity to the concerns and needs of others, and on those latter scores, I believe John Frank has studied Judge Bork's opinions and suggested that they showed a lack of sensitivity to issues affecting minority persons.

I believe that Senator Metzenbaum said earlier with reference to the *Cyanamid* case that perhaps Judge Bork was insensitive to the concerns of women. I myself feel that the way he treated the *Griswold* case in these very hearings indicated his lack of sensitivity to issues affecting women. He failed to see the impact that case had on the ability of women to get access to medical advice. Doctors were violating the law if they prescribed contraceptives in Connecticut during that period.

So I would worry about those other attributes of a wise and humane human being. I don't think sheer intellect should be the sole criterion for this position.

The CHAIRMAN. Thank you very much.

Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman, and I think also this discussion of privacy by this panel in answer to questions on both sides of the aisle has been extremely important. Perhaps when you represent as small and rural a State as I do, the sense of privacy becomes even more ingrained and a matter of some concern.

In fact, I hear it all the time in Vermont. It is a question that has been raised to me on street corners and town meetings, everything else. So let me just ask a couple questions on that which may help in the debate.

After all the talk about the constitutional right to privacy, about what the Constitution says and doesn't say, I'd like to pose a few questions. Let's assume for the moment that the Supreme Court were to cast aside the *Griswold* decision and the reasoning that backs up the *Griswold* decision.

Would there be anything in the Constitution that would prevent a State from passing one of the following statutes: A statute prohibiting the sale of contraceptives to unmarried couples? We can go back to it in more detail, but at least on first impression do any of you see anything in the Constitution that would then prevent a State from passing such a statute?

Ms. SULLIVAN. No.

Ms. KAY. No.

Senator LEAHY. How about then a statute requiring the use of contraceptives?

Ms. SULLIVAN. If *Griswold* were overturned? No.

Mr. Richards. No.

Senator Leahy. How about a statute authorizing the distribution of contraceptives to minor school students in order to stem the spread of AIDS absent *Griswold*? Again, the answer is no?

Ms. Sullivan. No.

Senator Leahy. How about a statute requiring abortions for women carrying the AIDS virus?

Ms. Sullivan. It could stand if *Griswold* were overturned.

Mr. Richards. Exactly.

Ms. Kay. Yes.

Senator Leahy. Now, I realize it was difficult for Judge Bork to talk about hypothetical cases that might come up, but you're all legal scholars in this area. Do you not see some of these hypotheticals that I have portrayed as possibilities of legislative action absent the protections laid out very clearly in *Griswold*?

Ms. Sullivan. Yes.

Mr. Richards. Absolutely, yes.

Senator Leahy. And, Professor Sullivan, you teach local government law as well as constitutional law, is that right?

Ms. Sullivan. That's right.

Senator Leahy. One of Judge Bork's criticisms of the constitutional right of privacy is that, and I think I'm using his words correctly, it strikes without warning. He's concerned that the development of the law in this area is unpredictable.

Now, if that criticism is right, I suppose local governments may be put in an unfair position. They'd have to guess whether a proposed law relating to marriage or maybe how many people can live in a household might violate the constitutional right of privacy.

So let me ask you. Does a constitutional right of privacy strike without warning?

Ms. Sullivan. I think it would be probably more true to history to say that local moral majorities can strike without warning. The examples I gave before I won't belabor.

The right of privacy doesn't strike without warning. It has been an extraordinarily limited right as expanded by the Supreme Court so far.

If I might, Senator Leahy, I'd like to explain why we all answered no when you said if *Griswold* weren't there, would there be something else in the Constitution that would protect our right of privacy. I think the reason we said that is that *Griswold* was an extraordinarily comprehensive set of opinions.

It exhausted the constitutional terrain. It mapped out where the right to privacy could be found in the Constitution. It said the structure of the Bill of Rights which gave us limited government—that was Justice Douglas' approach. Justice Harlan, Justice White took a different approach. They said liberty, the liberty clause of the 14th amendment.

Justice Goldberg, joined by Justice Brennan and Chief Justice Warren said it's liberty in the 14th amendment read in the light of the ninth amendment that says rights not enumerated in the Constitution we keep. We didn't give them away just because we didn't list them.

Senator Leahy. But, in fact, if that is a part of it, the ninth amendment, those rights retained, that is what I think I find, as one individual, so appealing in that because there are things that I think that we inherently know as Americans, as individuals, things that really should be liberty and are no business of government, but we can point to everything from local governments straight through the federal government where those liberties are trod upon in statutes.

Ms. **Sullivan**. I think that is fair enough to say, and I think the important point is to remember those opinions in *Griswold* were very eloquent, and there's no reason to suppose some new right to privacy is going to come barrelling down the pike if *Griswold* is overturned.

The Constitution is not like a new world full of new and interesting nooks and crannies. If it isn't in liberty, the structure of the Bill of Rights and the important reservation of unenumerated rights in the ninth amendment, it's not going to be found somewhere else.

So we should hold out no hope when Judge Bork says my ears are open. I believe his ears are open, but there is nothing more for him to hear. If *Griswold* is overturned, the right to privacy is gone.

Mr. **Richards**. It's an extremely dense set of opinions. There were four concurring opinions.

Senator **Leahy**. My time is up, but the reason I asked the question, and I find your answers so interesting, is that Judge Bork in his criticism of *Griswold* said not that he criticized the fact or not that he liked a law which told married couples, in effect, whether they could use contraceptives or not, but rather he felt that they should have looked for some other thing in the Constitution, some other reason in the Constitution to protect them in *Griswold* v. *Connecticut*. But there isn't anything else in the Constitution.

Ms. **Sullivan**. If it isn't liberty or the ninth amendment, which he called nothing more than an ink blot or a water blot, I don't see where it would be.

Senator **Leahy**. I agree.

Senator Thurmond, who is next on your side?

Senator **Thurmond**. Senator Humphrey.

Senator **Humphrey**. Thank you, Mr. Chairman. May I just begin with the observation that the arguments the Senator from Vermont raised suggesting that legislatures are free to ban the sale of contraceptives or to require the use of contraceptives or requiring the distribution of contraceptives to school children is a red herring. There isn't a legislature in the country that would do any of those things or which would require a woman who has the AIDS virus to have an abortion.

No legislature in this country would do that, and to raise those arguments is to resort to red herrings. The democratic process works usually and for the reasons of wishing to be reelected, legislators are not going to enact that kind of law.

Now, you are here obviously in opposition to Judge Bork's confirmation so it seems to me we have a right and indeed a responsibility to try to get some idea of where you are coming from in assessing and weighing your testimony.

Professor Richards, in reading your writings I come to the conclusion that you have a very broad concept of the privacy right, one which is so broad, indeed, that according to your writings, you believe that legislators have no jurisdiction passing a statute which makes prostitution unlawful.

You said in your piece, Sex, Drugs, Death and the Law, published in 1982, that, quote, "there are no good moral arguments for criminalizing consensual adult commercial sex and its punishment is a violation of the rights of the individual.

So am I correct, as I read this, in inferring that you believe that legislature have no business passing statutes making prostitution unlawful?

Mr. RICHARDS. Well, that is my view, Senator.

Senator HUMPHREY. That is your view.

Mr. RICHARDS. But I do draw a distinction in my work between the proper application of constitutional privacy which I limit and general arguments about decriminalization. Those latter arguments are really directed only at policy makers. I think I say that I do not believe constitutional privacy applies in this arena because of the special problems with commercial sex.

Therefore, I think a distinction should be drawn certainly in my own thinking between the proper scope of constitutional privacy which I think is a much more limited right because it's judicially enforced and complicated questions like the regulation of commercial sex where I believe there will always be a need for continuing regulation of some sort in that arena.

I would never advocate and have never advocated the use of privacy as a concept in that arena. It seems to me inappropriate and unwise. The argument was solely directed at policy makers, urging them to consider the European and British pattern which regulates commercial sex and does not prohibit it.

Senator HUMPHREY. Well, we go by the American pattern which gives legislatures the right to pass a statute which is consistent with the Constitution. Are you saying that is inconsistent with the Constitution?

Mr. RICHARDS. No, I'm not, Senator. I concede that in this arena. I do not, and I never have made or——

Senator HUMPHREY. Legislatures may outlaw prostitution consistent with the Constitution including the privacy rights?

Mr. RICHARDS. That is my view, but I also argue at some length it is unwise.

Senator HUMPHREY. You feel it is unwise to make prostitution unlawful. Well, that helps us in understanding where you're coming from. Let's turn to drugs.

You said in one of your pieces, "The right to use many drugs currently criminalized is one of the rights of the person which the State may not transgress." Do you feel that legislatures may not constitutionally pass laws making the use of drugs unlawful?

Mr. RICHARDS. No, I do not, Senator.

Senator HUMPHREY. Well, that's what your article says.

Mr. RICHARDS. Again, I would urge the same sort of distinction. I would have a very narrow conception of privacy in this arena and in general.

Senator HUMPHREY. Then on what grounds do you oppose criminalization?

Mr. RICHARDS. On grounds that it is ineffective in various sorts of ways.

Senator HUMPHREY. I beg your pardon?

Mr. RICHARDS. It's ineffective. A prohibitory policy is ineffective. It doesn't handle the problem. There are alternative regulatory ways.

Senator HUMPHREY. You do not favor a statute which makes unlawful the use of illicit drugs?

Mr. RICHARDS. That's not true, Senator. I believe in regulation in the——

Senator HUMPHREY. Statute. I'm taking about statute, not regulation.

Mr. RICHARDS. I do believe such statutes are, in general unwise, with the exception of, of course, the more intractable hard drugs where I do think——

Senator HUMPHREY. You regard such statutes including the many, probably numbering in the hundreds if not thousands, as unwise?

Mr. RICHARDS. Yes, I do, Senator. If I might amplify the point, Senator. My own views on the scope either of privacy or it seems to me the scope of decriminalization are, of course, not the issue in these hearings, and I would never oppose someone for not sharing my views.

Senator HUMPHREY. Well, the issue seems to be the issue of privacy. That is the issue which the opponents have tried to make. Are you saying that you agree with me that legislatures have the right to proscribe prostitution, use of illicit drugs consistent with the privacy rights of an individual?

Mr. RICHARDS. As a constitutional matter, yes, I do.

Senator HUMPHREY. I would think that you agreed with Judge Bork in this respect.

Mr. RICHARDS. On that point, Senator, but not on his general attack on privacy as a principle in our law. I mean the difference—I mean my disagreements——

Senator HUMPHREY. It's a distinction without a difference. The Judge says that there is not this vast unencumbered right to privacy. Maybe, by the way, that's unfortunate omission in our Constitution. Maybe we ought to amend the Constitution.

But you can't beat a guy to a bloody pulp because he refuses to find something which is clearly not there.

Mr. RICHARDS. Well, that's what is in dispute, Senator. I believe the right of privacy narrowly cabined as it has been by the Supreme Court clearly is in the American tradition for reasons I pointed out in my opening remarks, and the issues over the scope of the right are, of course, intractable and difficult as we have pointed out several times.

But the issue of the right being there is, it seems to me, quite clear as a matter of the text and history of this country, and I find Judge Bork's views frightening in that he manages to excise this tradition for arguments which seem to me very badly defended.

Senator HUMPHREY. I don't agree with that but unfortunately my time has expired.

The CHAIRMAN. The Senator from Alabama. Senator Heflin.

Senator HEFLIN. I'm sorry that I didn't hear all of your testimony. I have had to attend a committee meeting on the Iran-Contra arms sale matter so I hope I don't ask you something that's repetitious.

This being the year of the bicentennial, we all know that the Constitution was originally adopted without a Bill of Rights, and then by amendments, the Bill of Rights were added, largely as a result of the ratification process for the discussions in various forums that the rights that were implied should be put in print, and later, of course, we see the adoption of the Bill of Rights amendments.

Now, as I remember from the concept of the arguments, Hamilton and others felt that the federal government was a government of delegated powers; therefore, it was limited in its authority and, therefore, unless something was specifically delegate to the federal government, then the people, in effect, reserved that right.

Then we see the adoption of the ten amendments, and the ninth amendment comes along primarily as a result of Madison's desire to say that the listing of the various rights in the Bill of Rights is not to be all-inclusive, and therefore, they reserved to the people certain other inherent rights that they have.

Now perhaps, from your background in studying rights in regards to this, would you give us somewhat of a history of the development of the ninth amendment. Justice Goldberg does somewhat in the *Griswold* case, but not sufficiently, I think, from the viewpoint of people to understand exactly the status as of that time. Also the debates are pretty limited on the intent relative to the adoption of the ninth amendment in Congress. Could you give us any information that might help throw light on the purpose of the ninth amendment and what was in mind of the members of Congress as they drafted it?

Mr. RICHARDS. Senator, I addressed this issue in my statement. If I just might make a few summary remarks about the history that I explicate there. It is quite clear, the Founders, at least the delegates to the 1787 convention, did not believe a bill of rights was necessary. It arose very late in the convention and the view taken by the leading Founders, most notably James Madison of Virginia, James Wilson of Pennsylvania, and Alexander Hamilton of New York—they make these arguments at ratifying debates and in Federalist Papers, in the case of Hamilton—is that you do not need a bill of rights.

All rights are reserved from the people. This is a conception of the people retaining all inalienable rights and therefore, the very idea that the State could trench upon inalienable human rights is foreign to our whole conception of legitimacy; namely, rights are always reserved from the people and they fear, on the ground the idea of having a bill of rights. They make this point in their debate with the anti-Federalists.

They do not want a bill of rights because it will be taken to be exclusive and indeed I cite Iredell's remarkable speech in the North Carolina ratifying convention where he actually says we do not want a bill of rights because someone later on—and I say it is predictive of Judge Bork—will look back and say rights are only as defined in 1787, which will corrupt and degrade our whole tradition. They want rights fully protected, as indeed, they are viewed in later contemporary circumstances.

Therefore, the suggestion is we do not need a bill of rights because it will have this negative inference. Nonetheless, as you know, the leading States, Massachusetts, Virginia and New York, would not ratify without a strong assurance that a bill of rights would come. The anti-Federalists really had persuaded the nation that a bill of rights was needed. Americans were convinced of this and the argument is made you need rights put up in the document so that Americans will always remember what inalienable rights are.

This is a precious heritage and Americans have to be constantly reminded of this heritage to hold them accountable to these traditions. So, Madison realizes, when he is elected to the first Congress, that he must propose a bill of rights. It was a promise he had made in Virginia and he knew New York and Massachusetts required it, and so the Bill of Rights is drafted. But the ninth amendment is crucially required to rebut the inference, the malign inference, that all rights are only enumerated in the Bill of Rights and it, indeed, was really part of the compact between the Federalists and the anti-Federalists on the basis of which they would finally come to agreement. We would have a Bill of Rights, but there had to be an express guarantee that unenumerated rights of the person would be fully protected.

Therefore, the ninth amendment is at the absolute core of, it seems to me, both the Constitution and the 1791 debates and this idea of unenumerated rights is there as well—its core, in the Founders thinking, and that gives, I think, a kind of sense of the historic depth in the minds of the Founders, the moral depth of this tradition which they meant to protect by the ninth amendment. It cannot be said to have been inessential to their thinking. It was quite at the core, it seems to me, of what they thought you could reasonably expect from the Bill of Rights and their worries about the way in which a tradition of enumerated rights would be abused.

The **Chairman**. Thank you. Senator Hatch and then we will go to Elliot Richardson.

Senator **Hatch**. I think I will be happy to waive my questions.

The **Chairman**. Thank you all very much for your time.

Ms. **Sullivan**. Mr. Chairman, I take it Professor Kay's and my written statements will also be placed in the record along with Professor Richards.

The **Chairman**. Yes, your written statements will be placed in the record.

Ms. **Kay**. Chairman Biden, if I might take just one moment to correct the record? Secretary Carla Hills, in her testimony, suggested that Judge Bork's thinking on the question of equality affecting women was close to mine and she cited me by name in her testimony. Other scholars that she cited by name have written letters to the committee disassociating themselves from that interpretation of their work. I did not write because I knew I would be here today and I want to assure this committee that I do not believe that Judge Bork is relying on my analysis for his positions about the equality of women.

The **Chairman**. Thank you very much. We will take a 5-minute break—and I mean 5 minutes—so at 5 minutes of 12, we will start with former Attorney General and Secretary, a distinguished American, Elliot Richardson.

[Recess.]

The **Chairman**. The hearing will come to order. It is a great pleasure and an honor for this committee to have, as our next witness, a former Attorney General, one of the most distinguished Cabinet members we have ever had. I will not read his entire background except to say that among many other things, he will go down in American history as one of the men of great integrity and he is here to testify and, as I indicated earlier, we have been keeping witnesses to a 5-minute rule, but I think we should, quite frankly, make an exception in this case. Secretary General, you take as much time as you would like in your statement, but we will limit Senators to 5 minutes in their questioning. Welcome and please begin.

STATEMENT OF HON. ELLIOT L. RICHARDSON

Mr. **Richardson**. Thank you very much, Mr. Chairman.

The **Chairman**. Excuse me. I should swear you in. I beg your pardon. Do you swear the testimony you are about to give is the whole truth and nothing but the truth, so help you God?

Mr. **Richardson**. I do.

The **Chairman**. Thank you very much. Please begin.

Mr. **Richardson**. Thank you, Mr. Chairman. I very much appreciate this opportunity to testify on the nomination of Judge Robert H. Bork to the Supreme Court of the United States.

When I was first approached about testifying at this hearing, I was uncertain as to how far I would feel able to go in supporting Judge Bork's confirmation. He and I had served together in the Department of Justice from June to October, 1973. Because of that common experience, I have never had any hesitancy in attesting to his integrity, courage and uncommon intellectual honesty. He demonstrated these qualities in his handling of the charges against Spiro T. Agnew and his role in the crisis brought on by President Nixon's determination to get rid of Archibald Cox.

As to the Agnew affair, I would be glad to respond to the committee's questions. As to the Cox firing, I would like to summarize the essential facts as I saw them.

Robert Bork took no part in the negotiations leading to President Nixon's order to dismiss Mr. Cox. By the time Mr. Bork came into the picture as Acting Attorney General, after my resignation, and after the resignation of my Deputy, William D. Ruckelshaus, those negotiations and my meetings with the President and General Haig on the afternoon of October 20, 1973, had convinced me beyond any doubt whatsoever that the President was bound and determined to accomplish Mr. Cox's dismissal by one means or another. The refusal by Mr. Bork to carry out the President's order, or any delay on his part in doing so, would not have thwarted the President's determination. This was Mr. Bork's understanding. It was also Mr. Ruckelshaus' and my understanding when Mr. Bork elected to carry out the President's order.

There was no doubt, I should add, no doubt on my part that the President had the legal authority to order Mr. Cox's dismissal himself. I had previously sought and received a legal opinion to this effect. No one has suggested, moreover, that the terms of Mr. Cox's charter of independence, although published in the Federal Register constituted a departmental regulation having the force of law. If anyone can be blamed for failing to recognize a technical defect in the execution of the President's order, resulting from the fact that this regulation was not formally rescinded on October 20, I deserve my own share of that blame.

My decision to resign rather than fire Mr. Cox was compelled by my personal commitment to this committee. Mr. Bork was not a party to any such commitment. It did not occur to me, in any case, that my commitment should be regarded as binding on the Justice Department generally or on anyone what might succeed me as Attorney General.

As Acting Attorney General, Robert Bork was prepared to carry out the President's order, but he was concerned that doing so would expose him to so much criticisms that his usefulness would be impaired. Bill Ruckelshaus and I told him that we did not view this as a sufficient reason for precipitating what could well become a chain reaction. The Department would be facing tremendous pressure and would need strong leadership. It was also essential to maintain the continuity of the Watergate investigation. Mr. Bork yielded to these arguments and agreed to stay on.

One further point needs emphasis. I did not regard the President's order to fire Mr. Cox as part of an effort to cover up Presidential wrongdoing. On October 20, I believed it could be accounted for without attributing bad faith to the President. I thought that the so-called "Stennis compromise," although rejected by Mr. Cox, had been put forward in good faith. It was not until many months later that I came to the conclusion that the President's order was part of an effort to derail the investigation.

Mr. Bork's actions in the aftermath of the Cox dismissal contributed to the continuation and ultimate success of the Watergate investigation. He took immediate steps to keep the Watergate Special Prosecution Force together and insisted that it retain responsibility for the investigation.

So much, Mr. Chairman, for an issue as to which I have from the outset been happy to do what I could to assure that Judge Bork's role was fully understood and adequately appreciated. The uncertainty to which I earlier referred stems from utterances that made me wonder whether his views reflected the requisite balance between the two most basic considerations that constitutional adjudication is required to reconcile: on the one hand, due regard for continuity and stability and, on the other, openness toward the maturing values of a changing society.

My uncertainty has now been dispelled by the carefully considered testimony that Judge Bork has given to this committee. Though he may not assign the same weight to these considerations that I would give them, I regard his valuation of them as eminently reasonable. I am also satisfied that to portray him as bent on enshrining his every past utterance in some future majority opinion is worse than a caricature—it is a distortion.

In my judgment, moreover, the clarification of his views that has now emerged is entitled to be taken at face value. To treat it otherwise would be both insulting and implausible. Insulting because no foundation whatsoever has been laid for impugning his fidelity to the truth. Implausible for two reasons: first because it is natural that a sometime professor, now face to face with awesome responsibility, would reconsider earlier positions; second, because it is to be expected that a man of his formidable intellectual capacity would continue to think and learn and revise his opinions accordingly. Indeed, I would think less of him if he had not, upon mature reflection, modified many of his views.

As elaborated in his testimony, Judge Bork's concept of the judicial function has much in common with that of the two great judges for whom I served as a law clerk: Learned Hand and Felix Frankfurter. Both acknowledged Professor James Bradley Thayer of the Harvard Law School, who called attention to the consequences of excessive reliance for the protection of liberty on an unelected body appointed for life, as the most important influence on the shaping of their own judicial philosophies. Judge Hand reflected that influence in a famous address delivered in 1942 on the 250th anniversary of the founding of the Supreme Judicial Court of Massachusetts.

Speaking to the essentiality of judicial independence, he said: "But the price of this immunity—that is, the immunity conferred by independence—I insist, is that judges should not have the last word in those basic conflicts of right and wrong between whose endless jar justice resides. You may ask what then will become of the fundamental principles of equity and fair play which our constitutions enshrine; and whether I seriously believe that unsupported they will serve merely as counsels of moderation. I do not think that anyone can say what will be left of those principles; I do not know whether they will serve only as counsels; but this much I think I do know—that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish."

Judge Hand was the most profoundly thoughtful man I have ever known. So universally was he regarded as the greatest American judge of his time that the fact he was never named to the Supreme Court became the most often-cited example of the vagaries of chance that determine such choices. How would he be viewed today? In his Holmes Lectures, delivered at Harvard in 1958, he pressed the above-quoted conception of judicial self-restraint to the point of questioning whether it had ever been wise for courts to invoke the Bill of Rights as the basis for invalidating legislation. Judge Bork, even in his most professorial vein, has never gone that far; indeed, anywhere near that far. My point is simply that the restraint appropriate to constitutional adjudication is an issue inherently subject to widely differing views that will continue to be debated as long as courts are vested with the power of judicial review.

If I had the privilege of serving as one of Robert Bork's colleagues on the Court, I am sure we would often disagree. As I read the history of the Constitution, the language of the ninth amendment, the framers deliberately left open the question of what rights not mentioned in any constitutional language are nonetheless protected. It does not follow, however, that courts are left at large to define those rights. Judge Bork's answer to this question, as he has expounded it to you, is at least as much entitled to representation on the Court as my own.

Nor do I think it appropriate for Senators to approach their responsibility in this matter as if they were being asked to advise and consent to the nominations, not only of Robert H. Bork himself, but of two clones of Robert H. Bork. Only one name is before you. Judge Bork, to be sure, is a man of strong intellect, but he will not be among shrinking violets. Whenever his arguments command a majority, it will be because four other Justices agree with him. When his arguments do not convince four others, the need on their part to address those arguments will make it more likely that the prevailing opinion is cogently reasoned and persuasively expressed.

Briefly stated, Mr. Chairman, these are the reasons why I believe that Judge Bork should be confirmed. I will be happy to respond to questions.

[The statement of Hon. Elliot L. Richardson follows:]

Statement
by
Elliot L. Richardson
on the Nomination of Judge Robert H. Bork
to the Supreme Court of the United States

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When I was first approached about testifying at this hearing, I was uncertain as to how far I would feel able to go in supporting Judge Bork's confirmation. He and I served together in the Department of Justice from June to October, 1973. Because of that common experience I have never had any hesitancy in attesting to his integrity, courage, and uncommon intellectual honesty. He demonstrated these qualities in his handling of the charges against Spiro T. Agnew and his role in the crisis brought on by President Nixon's determination to get rid of Archibald Cox.

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My uncertainty has now been dispelled by the carefully considered testimony that Judge Bork has given to this Committee. Though he may not assign the same weight to these considerations that I would give them, I regard his valuation of them as eminently reasonable. I am also satisfied that to portray him as bent on enshrining his every past utterance in some future majority opinion is worse than a caricature -- it is a distortion.

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> But the price of this immunity, I insist, is that [judges] should not have the last word in those basic conflicts of "right and wrong -- between whose endless jar justice resides." You may ask what then will become of the fundamental principles of equity and fair play which our constitutions enshrine; and whether I seriously believe that unsupported they will serve merely as counsels of moderation. I do not think that anyone can say what will be left of those principles; I do not know whether they will serve only as counsels; but this much I think I do know -- that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.

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If I had the privilege of serving as one of Robert Bork's colleagues on the Court, I am sure we would often disagree. As I read the history of the Constitution and the language of the Ninth Amendment, the framers deliberately left open the question of what rights not mentioned in any constitutional language are nonetheless protected. It does not follow, however, that courts are left at large to define those rights. Judge Bork's answer to this question, as he has expounded it to you, is at least as much entitled to representation on the Court as my own. Nor do I think it appropriate for Senators to approach their responsibility in this matter as if they were being asked to advise and consent to the nominations not only of Robert H. Bork himself but of two clones of Robert H. Bork. Only one name is before you. Judge Bork, to be sure, is a man of strong intellect, but he will not be among shrinking violets. Whenever his arguments command a majority it will be because four other Justices agree with him; when his arguments do not convince four others, the need to address them will make it more likely that the prevailing opinion is cogently reasoned and persuasively expressed.

Briefly stated, Mr. Chairman, these are the reasons why I believe that Judge Bork should be confirmed. I will be happy to respond to questions.

The CHAIRMAN. Thank you very much, General, for an articulate and concise statement of support. I yield to the Senator from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman. Mr. Attorney General, we are glad to have you here. I just have two questions I would like to ask you. There has been a lot said here, of course, about Judge Bork firing Mr. Cox. I want to ask you one question on that. Do you think Judge Bork acted in the best sense of the Department of Justice and the country when he fired Mr. Cox?

Mr. RICHARDSON. Yes, I do, Senator Thurmond.

Senator THURMOND. The other question I would like to ask you is do you feel that Judge Bork possesses the qualifications to make an outstanding Supreme Court Justice of the United States? By that I mean, the qualifications that the American Bar Association uses, integrity, judicial temperament, and professional competency, as well as courage and dedication. Do you feel he possesses those qualities to make an outstanding Supreme Court Justice and do you know of any reason why the Senate should not confirm him?

Mr. RICHARDSON. I have no hesitancy whatsoever, Senator Thurmond, in saying that I believe that he does possess, in an outstanding degree, all the qualities you just enumerated. As I said in my prepared statement, before I had had the opportunity to consider the testimony given to this committee by Judge Bork, I had some question as to whether some of his views reflected a sufficient degree of openness toward the evolving values of a changing society and whether he would give a sufficient degree of weight to the precedents of the Supreme Court. As I said, his testimony has dispelled any questions I had on those points so that I am now, as I have said, unreservedly convinced that he would make an outstanding Supreme Court Justice, not only with respect to all the qualities of character that you touched on, but with respect to his contribution to the adjudication of the inherently difficult issues that will always divide a body of nine Justices.

Senator THURMOND. Do you know of anything against him that would prevent him from making a good Supreme Court Justice?

Mr. RICHARDSON. No.

Senator THURMOND. That is all. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. The Senator from Massachusetts, Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman. Mr. Richardson, I join in extending a warm welcome to you. We are extremely pleased to have you here today. You have served our country with honor and distinction in a broad variety of positions. But I think most Americans probably remember and admire you most for your actions as Attorney General during 1973, when you demonstrated your commitment to the rule of law by resigning rather than obeying President Nixon's order to fire Archibald Cox as the Watergate Special Prosecutor.

You later wrote in your book, "The Creative Balance," that President Nixon's entire effort at that time was directed at getting rid of Archibald Cox as Special Prosecutor so that he would not obtain the incriminating White House tapes. You wrote and I quote, "I was finally forced to conclude that from the beginning of the week, the name of the game had been get rid of Cox, get rid of him by resignation if possible, but get rid of him." We all remember the courageous action you took, Mr. Richardson, in standing up for the rule of law.

Judge Bork chose a different and a much more controversial course at one of the most critical moments of our history. Judge Bork obeyed the order of a corrupt President and denied the rule of law. A federal judge later ruled that Judge Bork had acted illegally. Judge Bork has claimed that the regulations were only a technicality and that everything turned out all right. But you and I lived through those days together, Mr. Richardson, 7 days in October of 1973, and it was by no means clear to either of us that everything would turn out all right.

The firestorm of public criticism had a great deal to do with the fact that everything did turn out all right. So did your courageous actions, Mr. Richardson. We cannot say the same about Judge Bork's actions and that is one of the reasons why this nomination is so controversial.

Mr. RICHARDSON. May I respond, Mr. Chairman?

The CHAIRMAN. Please.

Mr. RICHARDSON. I very much appreciate Senator Kennedy's allusions to and quotations from my book. I am sorry it is out of print. But his quotation was also somewhat selective. He alluded to those 7 days in October and to the aftermath of the so-called "Saturday Night Massacre" and to the fact that it did turn out all right. It turned out all right, Senator Kennedy, in significant part because of the role played by Robert H. Bork. One of the concerns that Bill Ruckelshaus and I had in urging him to stay on was that there would be a situation fraught with enormous tension, that anyone in the position of Acting Attorney General would be subject to great pressure and that it was vital that the continuity of the Watergate investigation and the integrity of the Watergate Special Prosecution Force, be maintained.

Judge Bork, from the very moment that he became Acting Attorney General, and after the firing of Archibald Cox, fulfilled that commitment to the integrity of the Special Watergate Prosecution Force. As testimony before this committee has brought out, as early as Monday, he was already seeking advice from the American Bar Association as to individuals who might capably serve as a successor to Archibald Cox. I think, as I also acknowledge in that book, a few pages further on, I think the nation owes a substantial debt to Robert Bork for his services in that situation.

Senator KENNEDY. There have been some that suggested that he could have fired Archibald Cox and then after the re-establishment of a Special Prosecutor—he could have resigned and the continuity would have continued in terms of the power of appointment that exists within the President and that would have been a more satisfactory way of proceeding.

Mr. RICHARDSON. With respect, Senator, it seems to me a silly suggestion. Why would the best possible man to be Acting Attorney General, quit after having gone through with the most distasteful and painful part of the job? He had already done that. His original idea, as I have testified this morning and as my book also notes, was to carry out the firing and then resign. He was concerned that, as he put it, he would be viewed as an apparatchik, that the opprobrium attached to that term would impair his usefulness as Acting Attorney General. Bill Ruckelshaus and I talked him out of that. We said that is not a sufficient reason for you to resign, and we eventually convinced him of this with the beneficial contribution to the public interest that I have just mentioned.

I might add, too, Senator, that I touched on this business about the illegality of the firing on page two of my prepared statement. Again with respect to Judge Gesell, his version of the "regulation" has always seemed to me excessively legalistic. It did not occur to anyone on Saturday, October 20, 1973, that the mere fact that my agreement with Archibald Cox had been published in the Federal Register, constituted a legal barrier to Mr. Bork's action. I do not believe it did. I already had had, as I said, an opinion of the Office of Legal Counsel of the Department of Justice, to the effect that the President could have fired Cox himself at any time. He was certainly entitled to get it done.

The problem I had and the problem Bill Ruckelshaus had was the problem arising out of the fact that the terms of Cox's charter had been negotiated with Cox and with this committee, as you would well remember, but the question of whether the order should have been rescinded or when it was rescinded, seems to me, very inconsequential in the light of the circumstances as a whole.

Senator KENNEDY. Well, could I just finish my thought?

The CHAIRMAN. Yes.

Senator KENNEDY. I remember, during the course of those hearings in establishing the Special Prosecutor and the issuing of the various regulations, the exchange that you had with Senator Mathias, that I believe was referred to actually in Judge Gesell's ruling. "Senator Mathias. That brings me to one further question on the guidelines. Had you considered the mechanism by which you finally published them? They could be published in the Federal Register in the manner in which the Department regulations are published, could they not?

"Mr. Richardson, that is what I expected to do, because to a degree, they supersede the regulations that provide for delegation, for example, to the Assistant Attorney General for the Criminal Division in certain respects and so therefore, the most effective way of making sure that they do, as a matter of law, supercede the existing regulations to give them the same legal status through publication in the Federal Register." I think that that is, at least it is my understanding, the reason why Judge Gesell believed that they did have the power of the rule of law in his decision and it was later upheld in the *Nixon* case.

Mr. RICHARDSON. Well, I think the operative words there, Senator, are the same status. Arrangements involving the delegation of functions to individuals within the executive department, where those functions are not prescribed or limited by statute, is a matter that the head of a department can address at any time. Certainly that has always been my assumption.

Senator KENNEDY. So the agreement was really just between you and the committee?

Mr. RICHARDSON. That was what I thought.

Senator KENNEDY. You really believed that at the height of the Watergate crisis, that the arrangements that were made with the

Judiciary Committee were only limited to you, as an individual, and not in terms of the institution that was set up?

Mr. RICHARDSON. Yes. That was the issue, if you will recall. The reason why the hearings took so long was that it was my position that as Attorney General of the United States, I could not abdicate responsibility for the investigation. I, therefore, insisted on reserving the power to fire Cox. The issue then became one of "for what" which, of course, led to the phrase "only for extraordinary improprieties on his part.

Senator KENNEDY. So it was just limited to you?

Mr. RICHARDSON. But in the confirmation hearing of me, the understandings were understandings arrived at as conditions for the willingness of this committee to report out the nomination. It was never suggested, to my knowledge, at any point in the hearings that this understanding would have the force the law or be binding on any future Attorney General. That was precisely what I wanted to resist. I fought against the creation of some external mechanism beyond my accountability as Attorney General, comparable, for example, to the present status of an independent counsel, in order to maintain accountability.

The members of the committee resisted that. They wanted to have some device that would assure that the independence of the Special Prosecutor was not thus subject to my overall eventual responsibility, and that is why the charter came out the way it did and had the status that I have always believed it to have. In any case, the really key point, I think, is that on October 20, 1973, whatever a judge might later conclude on looking at the testimony, looking at the charter, looking at the regulations, these considerations did not even arise.

Senator KENNEDY. Well, Mr. Chairman, I just ask to put in the record the regulations. They were worked out. As a member of this committee, I remember very clearly. I was very much involved with that and I have enormous regard and respect for my good friend, Secretary Richardson, but I think it goes beyond imagination that the members of this committee were thinking that all of this was just established for Mr. Richardson and not for the office. The last regulation says, "for the duration of the assignment, the Special Prosecutor will carry out these responsibilities with the full support of the Department of Justice until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself.

As a member of that committee, I think it is very clear both from the record and the history and what this country was faced with it, that this was not a personal contract with Mr. Richardson, but it was with the office itself. That is beyond really what this hearing is about. I do appreciate the chance to include those matters in the record.

The CHAIRMAN. Without objection, they will be included.

[Regulations referred to follow:]

CREATION OF THE WATERGATE SPECIAL PROSECUTION FORCE

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

PART 0—ORGANIZATION OF THE DEPARTMENT OF JUSTICE

Order No. 517-73

ESTABLISHING THE OFFICE OF WATERGATE SPECIAL PROSECUTION FORCE

By virtue of the authority vested in me by 28 U.S.C. 509, 510 and 5 U.S.C. 301, there is hereby established in the Department of Justice, the Office of Watergate Special Prosecution Force, to be headed by a Director. Accordingly, Part 0 of Chapter I of Title 28, Code of Federal Regulations, is amended as follows:

1. Section 0.1 of Subpart A, which lists the organizational units of the Department, is amended by adding "Office of Watergate Special Prosecution Force" immediately after "Office of the Pardon Attorney."

2. A new Subpart G-1 is added immediately after Subpart G, to read as follows:

"*Subpart G-1—Office of Watergate Special Prosecution Force*

§ 0.37 *General Functions.*

The Office of Watergate Special Prosecution Force shall be under the direction of a Director who shall be the Special Prosecutor appointed by the Attorney General. The duties and responsibilities of the Special Prosecutor are set forth in the attached appendix which is incorporated and made a part hereof."

This order is effective as of May 25, 1973.

(S) ELLIOT RICHARDSON,
Attorney General.

Date: May 31, 1973.

Appendix on Duties and Responsibilities of the Special Prosecutor

The Special Prosecutor. There is appointed by the Attorney General, within the Department of Justice, a Special Prosecutor to whom the Attorney General shall delegate the authorities and provide the staff and other resources described below.

The Special Prosecutor shall have full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee Headquarters at the Watergate, all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General.

In particular, the Special Prosecutor shall have full authority with respect to the above matters for:

—conducting proceedings before grand juries and any other investigations he deems necessary;

—reviewing all documentary evidence available from any source, as to which he shall have full access;

—determining whether or not to contest the assertion of "Executive Privilege" or any other testimonial privilege;

—determining whether or not application should be made to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders;

—deciding whether or not to prosecute any individual, firm, corporation or group of individuals;

—initiating and conducting prosecutions, framing indictments, filing informations, and handling all aspects of any cases within his jurisdiction (whether initiated before or after his assumption of duties), including any appeals;

—coordinating and directing the activities of all Department of Justice personnel, including United States Attorneys;

—dealing with and appearing before Congressional committees having jurisdiction over any aspect of the above matters and determining what documents, information, and assistance shall be provided to such committees.

In exercising this authority, the Special Prosecutor will have the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice. The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions. The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities. The Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part.

Staff and Resource Support

1. *Selection of Staff.* The Special Prosecutor shall have full authority to organize, select, and hire his own staff of attorneys, investigators, and supporting personnel, on a full or part-time basis, in such numbers and with such qualifications as he may reasonably require. He may request the Assistant Attorneys General and other officers of the Department of Justice to assign such personnel and to provide such other assistance as he may reasonably require. All personnel in the Department of Justice, including United States Attorneys, shall cooperate to the fullest extent possible with the Special Prosecutor.

2. *Budget.* The Special Prosecutor will be provided with such funds and facilities to carry out his responsibilities as he may reasonably require. He shall have the right to submit budget requests for funds, positions, and other assistance, and such requests shall receive the highest priority.

3. *Designation and Responsibility.* The personnel acting as the staff and assistants of the Special Prosecutor shall be known as the Watergate Special Prosecution Force and shall be responsible only to the Special Prosecutor.

Continued Responsibilities of Assistant Attorney General, Criminal Division. Except for the specific investigative and prosecutorial duties assigned to the Special Prosecutor, the Assistant Attorney General in charge of the Criminal Division will continue to exercise all of the duties currently assigned to him.

Applicable Departmental Policies. Except as otherwise herein specified or as mutually agreed between the Special Prosecutor and the Attorney General, the Watergate Special Prosecution Force will be subject to the administrative regulations and policies of the Department of Justice.

Public Reports. The Special Prosecutor may from time to time make public such statements or reports as he deems appropriate and shall upon completion of his assignment submit a final report to the appropriate persons or entities of the Congress.

Duration of Assignment. The Special Prosecutor will carry out these responsibilities, with the full support of the Department of Justice, until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself.

3128

NOMINATION OF ELLIOT L. RICHARDSON TO BE ATTORNEY GENERAL

2458-2

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-THIRD CONGRESS

FIRST SESSION

ON

NOMINATION OF ELLIOT L. RICHARDSON, OF MASSACHUSETTS,
TO BE ATTORNEY GENERAL

MAY 9, 10, 14, 15, 21, AND 22, 1973

Printed for the use of the Committee on the Judiciary

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would be somewhat difficult, notwithstanding my sympathy for objective here, to make a brief summary of 25 or 30 minutes of phone call.

Mr. Cox. Yes. I didn't understand the Senator to refer to a script of any conversation between us, but I think under all the cumstances, it would be appropriate to make a special effort to to the main items of the conversation and a very particular record the time and place and things of that kind.

Senator MATHIAS. If I could hypothesize just a second, this ing a question came up as to what the Special Prosecutor would he observed that the U.S. attorney in a certain jurisdiction were ing down on the job, and it seems to me that in that kind of situat he might call up the Attorney General and say, we have a pro and the results of that conversation—not the detail of it, but that they concurred that the U.S. attorney should be removed further participation in the case, or that he should be supplem by a special assistant, or whatever the decision is—I think that that we are getting at here.

Mr. Cox. I think that is a very important, excellent sugge I see no difficulty, because I do understand that it doesn't involve effort to make a complete transcript which could become cumber

Senator MATHIAS. Well, if that is agreeable to you and to the Sec tary, I think it might be a helpful method of insuring the comp accountability of these proceedings.

Secretary RICHARDSON. Yes. Let me mention again, Senator Math the possible desirability at some stage which Professor Cox have to determine upon when the investigations were sufficiently plete so as to make it appropriate for a kind of postaudit conducted, and at that point, whoever did it—it might be a pan three distinguished citizens enlisted for that purpose—it would ously be highly valuable to them in carrying out that function have available a full and comprehensive record of all of the that Professor Cox had taken and that were taken under his direction. It seems to me that this is a situation where that kind record is [illegible] important than would ordinarily be true and it is importan[illegible]use the issue in the end is one of confidence. And said the [illegible] day, since the necessity may arise in certain circ stances of proving a negative, the more adequate is the record of was done to turn up possible evidence and what was done to, down every lead will be, in the end, if the conclusion was neg the only way of providing assurance that all possible steps were

Senator MATHIAS. Well, that is exactly what I had in mind in ing this suggestion and I am very happy if it can be adopted as of the guidelines.

That brings me to one further question on the guidelines. Had considered the mechanism by which you would finally publish They could be published in the Federal Register in the manner which departmental regulations are published; could they not?

Secretary RICHARDSON. That is what I expected to do, because to a degree supersede the regulations that provide for delegation, example, to the Assistant Attorney General for the Criminal Div in certain respects, and so therefore, the most effective way of [illegible] that they do, as a matter of law, supersede existing regulations, is to give them the same legal status through publication in the Federal Register.

Senator MATHIAS. And I have just one further question of the Secretary.

When we were in the previous hearing here, we discussed the question of some statutory guidelines for the Federal Bureau of Investigation, particularly in the area of espionage, crime, and domestic surveillance, in which there ought to be, it seems to me, some permanent statutory guidelines. In the light of some of the stories in the press which have been circulating in the past week or two, it seems to me that this matter is perhaps even more critical than when we discussed it last week and that the desirability of statutory guidelines, to which you agreed at the time, is even more pressing. I am wondering if at some early time after you have assumed the duties of the Attorney General, whether you could give the committee your advice on the guidelines which you think would be appropriate in these very vital areas so that we can consider together what needs to be done. Because very clearly, this is an area which seems to be out of hand.

Secretary RICHARDSON. I agree, Senator Mathias. I would be glad to discuss with the chairman and you and other members of the committee what would be the best way to proceed. One way to do it would be for me to develop specifications for a bill that could be submitted to you for review and then be the subject of a hearing, or we could develop specifications of the bill and discuss it informally, leading toward the development of definitive legislation.

Senator MATHIAS. Well, I think that would be extremely useful and I do think it is urgent. I am not trying to impose any deadlines on you. When my father and I were practicing law, he used to correct me if I promised a client that we would have a deed ready for him on Thursday. He said, tell the client that you will have the deed at the earliest possible moment. So I will impose that kind of deadline upon you.

Secretary RICHARDSON. I will be very glad to accept it on those terms.

Senator MATHIAS. All right, fine. Thank you very much.

The CHAIRMAN. Senator Hart.

Senator HART. It is rather late in the day, Mr. Secretary.

Professor, I add my welcome. I congratulate the Secretary on his choice, and I am delighted, Professor, that you are accepting.

Earlier, we were getting pretty far out on the limb about the degree of independence that we were insisting on. I think that through an exchange of correspondence with the Secretary, we have developed some guidelines and through the discussions that were a part of this record, we have pretty well nailed down a degree of independence which I believe will permit the people of this country to believe what you finally report to them; at least believe that it is your best judgment and yours alone. I had made clear earlier that I never thought the Secretary would do other than what the facts require even if he was running the investigation, but along with others, I did have concern that we attach as much of the appearance of objectivity as humanly possible.

The **Chairman**. Senator Hatch.

Senator **Hatch**. Thank you, Mr. Chairman. Welcome, General Richardson. We are grateful to have you here today. Mr. Chairman, Senator Specter has to leave, but he has one question so let me yield to him for the one question, then I would like to make some points.

Senator **Specter**. Thank you very much, Senator Hatch. I appreciate your yielding to me. I must leave in a moment or two and there was just one point that I wanted to ask you about, Mr. Attorney General. You point out, at page three of your statement, that it was essential to maintain the continuity of the Watergate investigation and that Judge Bork took immediate steps to keep the Watergate Special Prosecution Force together.

The one factual question which I would like to have answered, although I do not know how much weight this has really on the proceeding as a whole, but I would be interested to know your understanding of the facts because I have heard it reported that the initial position taken by Judge Bork was to return the Watergate Special Prosecution Task Force to the Department of Justice, to Mr. Peterson, who was then the Assistant Attorney General in charge of the Criminal Division. It was only after the public furor arose that the matter was returned to Mr. Ruth and others on the Special Task Force.

Mr. **Richardson**. As to these events, Senator Specter, I was, of course, not a firsthand witness. What I know about them derives partly from what I was being told by former associates in the Department at the time. I was, of course, acutely interested and concerned. Some of what I am now aware of is what I have been reminded of in recent weeks and, to some extent, from other sources, so it is a little hard to know what exactly I knew then.

But I can only say that my understanding of Bob Bork's role, as I wrote in my book, goes even beyond what I think it may actually have been. I thought that he had, from the outset, insisted that there must be a new Special Prosecutor, that he had directly resisted the President's directive to return the responsibility for the investigation to the Assistant Attorney General, Henry Peterson. When I resigned on the afternoon of October 20, the President told me that this was what he intended to do and that he intended to get the Watergate Special Prosecution Force disbanded.

I am satisfied, from all that I know, that from the outset, Bob Bork was first of all, determined to make sure that the Special Prosecution Force was kept intact so that it could carry on the investigation. The question at the outset as to whether it was under Peterson as Assistant Attorney General, was a secondary question as long as the people involved, Ruth and Lacavara and others, were in charge of the investigation itself. Of course, whatever may have been the uncertainties as to the Peterson role from the afternoon of October 20—those uncertainties were certainly removed very quickly when Bob Bork began to pursue the replacement of Archibald Cox.

That is really about all I know. I do not think there is any basis for the impression that he was ever part of any effort, originating in the White House, to undercut the integrity or the continuity of the investigation.

Senator **Specter**. Thank you very much, Mr. Attorney General. Thank you, Senator Hatch.

The **Chairman**. Senator Heflin.

Senator **Heflin**. General, if you had not made a commitment to the Judiciary Committee, would you have fired Archibald Cox?

Mr. **Richardson**. Well, that is an impossible question. I believed that the role of the Special Prosecutor should be independent from outside interference. I would have to go back. When the President asked me to become Attorney General in May, he left to me the question of whether or not a Special Prosecutor should be appointed at all. I thought about that for about a week, more or less, and announced, at the end of that period, that I concluded that I should appoint a Special Prosecutor. I gave, as my principal reason, the fact that I had been associated with the Nixon administration from the beginning and that although I felt confident in my own ability to carry out or assume responsibility for the investigation without being subject to external pressure from the White House or anywhere else, nevertheless, I thought that public confidence in the investigation would be enhanced if it were placed in the hands of a Special Prosecutor.

And I think that my announcement addressed the essentiality of his independence. Certainly, in any case, from my very first discussion with Archibald Cox himself, the question of how his independence would be expressed, and respected, was at the very forefront of our discussions.

It was clear that he would only take the job if he was satisfied on this score, and in fact he and I had reached what was to us an adequate understanding on that point, before the further concerns about it were expressed by this committee.

So, the question of my firing Cox could not have arisen under any circumstances in which I was involved, if the basis of firing him had not been clearly founded on some impropriety on his part, some demonstration of incapacity, or something else that would in fact have been extremely unlikely.

The issue, therefore, became one of the inherent power of the President over the executive branch, and executive branch employees.

This was the question addressed in the memorandum I mentioned earlier by the Office of Legal Counsel, which concluded that the President could have fired Cox himself, regardless of the charter.

I felt strongly, that the grounds on which the President wanted Cox fired were a mistake, apart from the charter, because they included a restriction on Cox's access to tapes not already subpoenaed.

And I spent much of Friday trying to convince the White House that that restriction should not be proposed. In fact I spent much of the week trying to fight it off.

So, I guess that is a long way of saying, Senator, I cannot place myself in that hypothetical situation.

Senator **Heflin**. Well, I gather from your answer, you indicate that you in effect made a commitment to the committee, you made a commitment to Archibald Cox on his independency in the role.

Do you consider that those commitments—well, I will ask you this: do you consider that your commitment to Cox was between you and him, and did not inure to your successor?

Mr. Richardson. Yes, as I so—as my prepared statement says, I thought that his successor could of course conclude that he should renew this understanding with Cox, or with a successor to Cox, but that whether he did it or not was not controlled by what I had done.

As I said to Senator Kennedy, we never would have had the protracted hearings that we had. I would not have had to negotiate with individual Senators, particularly Senator Hart of Michigan, over this issue, if I had not said I am not going to take over the Department of Justice on any terms that place my ultimate responsibility toward this investigation on a different footing than anything else in the Department.

So, the question was how do you square that circle? How do you assure independence on the one side? And what I said in effect was, I will observe these understandings, and as far as I was concerned that was it. That the committee, if these understandings had not been voluntarily sustained by a—a second Attorney General would have had to take steps to reinstate them.

Senator Heflin. One further question. Do you think that your advocacy to Robert Bork, to stay on as prosecutor, and to comply with the President's request, was a violation of your commitment of independence to Mr. Cox?

Mr. Richardson. I did not think it was a violation of my commitment. I was already out, or on the way out. I am a little unclear as to how much of the discussion took place after the Cox press conference, and before I went to the White House, and how much of it took place when I came back.

In any case, what I have said, I believed that the President would accomplish the firing in one way or another. I believe that he had the legal right to do so. I believe that Bork was not personally subject to the same commitments, and was thus personally free to go forward with this action, and that his doing so, in the circumstances, was in the public interest.

I was concerned that if he did not, as I said, a chain reaction could follow, meaning that if he resigned, the dominoes could fall indefinitely, far down the line, leaving the Department without a strong and adequately qualified leader.

That was a very practical concern. We had a situation in which not only Ruckelshaus and I, but all my top staff, were picking up and leaving.

So I say, I did not think that Bork was bound. Cox would be out. I would be out.

The question really, as a practical matter was, how do you maintain the continuity and the integrity of the investigation in these circumstances?

The Chairman. Thank you. Senator Hatch.

Senator Hatch. Thank you, Mr. Chairman.

Again, I welcome you, Mr. Richardson, to our committee. I think you have put to bed this issue of Watergate. It should have been put to bed many years ago, and I think by your prior statements you have done it again here today.

And I thought it was very interesting when Professor Oakes, who testified yesterday, whose reputation is absolutely impeccable, as is yours, made it very clear that Robert Bork was instrumental in obtaining Leon Jaworski who finally did really put the Watergate matter behind all of us.

So I do not know what all the fuss is anyway. Let me just take a few minutes. This type of fuss is part of what I am going to go into for just a few minutes at this time.

From the outset of this debate, we have all been barraged with politics, we have been lobbied, we have been lied to, we have been led astray by charges and counter-charges.

And perhaps the key example of this phenomenon has been the full-page ads that have been put in the newspapers. They are really offensive. These ads mischaracterize, they misconstrue, they mislead, and I think they distort Judge Bork's record, with regard to his record.

Now just to test that these articles mislead, I picked up one of these ads and put it together, and in just a short while I decided to analyze it, and I illustrated 67 falsehoods in this one full-page ad put out by People For The American Way.

Now I cannot go into all the falsehoods, so I would ask unanimous consent that these 67 flaws that I have put together be placed in the record at this point, Mr. Chairman.

The CHAIRMAN. Surely.

[Aforementioned material follows:]

67 FLAWS OF THE BORK AD

FALSEHOOD 1: THE TITLE. "BORK VS. THE PEOPLE" GROSSLY MISLEADS AND MISCONSTRUES HIS PHILOSOPHY. MORE THAN ANY OTHER JURIST IN MODERN HISTORY BORK WOULD SUSTAIN THE PEOPLE'S RIGHT TO GOVERN THEMSELVES. THE TITLE SHOULD FAIRLY BE: BORK AND THE PEOPLE VS. THE SPECIAL INTERESTS.

FALSEHOOD 2: CONTROVERSY BASED ON "GOOD REASON." JUDGE BORK IS EMINENTLY QUALIFIED AND CENTRIST IN HIS VIEWS. THE CONTROVERSY IS GENERATED BY THOSE WHO DO NOT WANT PRESIDENT REAGAN TO MAKE ANOTHER APPOINTMENT.

FALSEHOOD 3: "EXTREMIST." THOSE CALLING HIM "EXTREMIST" WOULD NOT KNOW A JUDICIAL MAINSTREAM FROM A JUDICIAL JET STREAM. SIX RECENT ATTORNIES GENERAL FROM BOTH PARTIES TESTIFIED. NONE OF THEM CONSIDERED HIM EXTREME, BUT ENDORSED HIM.

FALSEHOOD 4: "CONSISTENTLY TAKEN POSITIONS AGAINST CONSTITUTIONAL RIGHTS." IN FACT, HE HAS STRONGLY DEFENDED THE RIGHTS OF AVERAGE AMERICANS TO GOVERN THEMSELVES. HE HAS CONSISTENTLY SUSTAINED EVERY RIGHT FOUND IN THE CONSTITUTION AND OPPOSED JUDGES WHO TRIED TO INTERPRET THE CONSTITUTION TO FIT THEIR OWN VIEWS.

FALSEHOOD 5: "STERILIZING WORKERS." JUDGE BORK DID NOT FORCE ANY STERILIZATION.

FALSEHOOD 6: "COMPANY WAS PUMPING SO MUCH LEAD." THIS CREATES A FALSE IMPRESSION. IT IS NOT MENTIONED THAT AN ADMINISTRATIVE LAW JUDGE HAD FOUND THAT THERE WAS NO WAY TO ELIMINATE THE LEAD LEVELS SUFFICIENT TO ELIMINATE THE RISK. JUDGE BORK WAS BOUND BY THAT FINDING.

FALSEHOOD 7: "THE COMPANY ORDERED ALL WOMEN WORKERS TO BE STERILIZED OR LOSE THEIR JOBS." IN FACT, THE COMPANY OFFERED THE WOMEN A CHOICE. DUE TO THE HAZARD, FERTILE WOMEN COULD NOT WORK in the plant. Rather than release the women outright, they were offered a choice. The women themselves made a very difficult decision.

Falsehood 8: "When the union took the company to court." This is only part of the truth. It is never mentioned that the OSHA Review Commission, the expert government agency, had already found the company could offer the women a choice.

Falsehood 9: "Judge Bork ruled in favor of the company." This sounds like Judge Bork approved of the "unhappy choice" the women had to make. In fact, he deplored it.

Falsehood 10. (Same as above) This is political falsehooding at its worst. Judge Bork is solely blamed. It is not mentioned that the court was unanimous. One of the other judges voting to uphold the law as written was Judge, now Justice, Scalia. Indeed the rest of the Circuit judges refused to overturn the unanimous court ruling.

Falsehood 11: (same as above) Blatant sensationalism. It is not mentioned that the law as written by Congress did not include this situation as a "hazard" within the terms of the OSHA Act. To the extent that failure to anticipate this regrettable situation is cause for blame, Congress caused it and should correct it by legislation.

Falsehood 12: "Billing Consumers." This is incorrect. Neither Bork nor the court could bill or authorize the billing of any consumer. That was FERC's responsibility.

Falsehood 13: "Bork supported an electric utility." This is incorrect. In 1984, the date cited by this account, Judge Bork specifically voted against the utility and sustained the Commission.

Falsehood 14: (same as above) Deliberate misleading information. Even in the 1985 and 1987 rehearings of this issue, Judge Bork did not rule on the merits of whether consumers could be billed, but only determined that FERC had not adequately responded to the evidence of the case.

Falsehood 15: "Thanks to Judge Bork." Hyperbole. Judge Bork is blamed for a decision of the majority of the D.C. Circuit. This overlooks that the court was unanimous in 1984 in favor of FERC, that the court voted 2-1 in 1985 against FERC, and that the court voted 5-4 in 1987 against FERC. Judge Bork was joined by at least a majority of his colleagues on the Circuit Court.

Falsehood 16: "(. . . 1984)." As noted earlier, this citation ignores that these facts were subject to three separate judicial rulings.

Falsehood 17: "No privacy." Misleading. Judge Bork does not oppose "privacy," either per se or as a constitutional value. As a matter of personal preference, he expressed great respect for privacy. He states, for instance, that the 1st, 4th, and 5th Amendments, among others, specifically protect privacy interests.

Falsehood 18: "Right to privacy in the Constitution". No one else found one either until 1965 when some judges discovered it in the "penumbras of the emanations" of some constitutional phrases. This overlooks that the word "privacy" nowhere appears in the Constitution and that the judicial creation of this undefined right was controversial in 1965 and remains controversial today. Justices Black and Stewart found no such right at the time. Professors of all backgrounds, from Bickel to Kurland, have likewise criticized the reasoning in this case.

Falsehood 19: (same as above). This overlooks the impossibility of defining a broad constitutional privacy right. As Judge Bork asked, does this mean privacy to take drugs in your own home, privacy to fix prices in your own home, privacy to abuse a spouse in your own home? Of course not.

Falsehood 20: "Supreme Court was wrong". Judge Bork faults the reasoning of the Court, i.e., the invention of unwritten rights, but he called the Connecticut contraceptive law "nutty."

Falsehood 21: "Use of contraceptives by married couples a punishable crime". This leaves the impression that married couples were convicted of such a crime. As Judge Bork mentioned, the "nutty" Connecticut statute was never used to punish a married couple for use of contraceptives.

Falsehood 22: "Turn Back the Clock on Civil Rights". Unfounded slander. Judge Bork has advanced civil rights in all his public service capacities. He has never "turned back the clock." Robert Bork has never advocated (as Solicitor General) or rendered a judicial decision (on the D.C. Circuit) that was less sympathetic to minority or female plaintiffs than a majority of the Supreme Court. As S.G., Judge Bork won several significant advances for civil rights, including prohibition of private discriminatory contracts (Runyon v. McCrary) and redistricting to enhance minority voting strength (United Jewish v. Carey).

Falsehood 23: "ugliness". "Ugliness" was indeed the word Professor Bork used to describe coercion of private accomodations owners, but "ugliness" was also the exact word used in the same article to castigate all forms of racial discrimination. Professor Bork's position, even though later recanted, should not be portrayed in a light that appears insensitive to racial prejudice.

Falsehood 24: "how Professor Bork described a law". Selective quoting out of entire context. This 1963 statement was recanted over fourteen years ago. Judge Bork's admission of error is well-known, yet nowhere mentioned in this tabloid.

FALSEHOOD 25: "CRITICIZED DECISIONS THAT STOPPED STATES FROM USING POLL TAXES". HALF TRUTH. JUDGE BORK PERSONALLY OPPOSES POLL TAXES; HE CRITICIZED ONLY THE REASONING BY WHICH THE COURT REACHED ITS RESULT -- POSITION SHARED BY JUSTICES HARLAN, STEWART, FRANKFURTER, JACKSON, BRANDEIS, CARDOZO, AND BLACK, NOT TO MENTION A BROAD ARRAY OF CONSTITUTIONAL SCHOLARS.

FALSEHOOD 26: "CRITICIZED DECISION THAT STOPPED STATES FROM USING . . . LITERACY TESTS". HALF TRUTH. JUDGE BORK PERSONALLY OPPOSES LITERACY TESTS; HE CRITICIZED ONLY THE REASONING BY WHICH THE COURT REACHED ITS RESULT -- A POSITION SHARED BY JUSTICES HARLAN, STEWART, BURGER, BLACK, BLACKMUN, AND POWELL, NOT TO MENTION A BROAD ARRAY OF CONSTITUTIONAL SCHOLARS.

FALSEHOOD 27: "POLL TAXES . . . TO KEEP MINORITIES FROM VOTING". THIS IS INCORRECT. THIS MISSTATES THE SUPREME COURT CASE IN QUESTION. THE COURT IN HARPER POINTEDLY MENTIONS THAT THE CASE INVOLVED NO EVIDENCE OF RACIAL DISCRIMINATION.

FALSEHOOD 28: (SAME AS ABOVE). THIS IS A GROSSLY UNFAIR CHARACTERIZATION. JUDGE BORK STATED THAT IF THE HARPER DECISION HAD INVOLVED RACIAL DISCRIMINATION, HE WOULD NOT HAVE CRITICIZED IT. HE WOULD VOTE TO STRIKE DOWN ANY DISCRIMINATORY POLL TAX.

FALSEHOOD 29: "LITERACY TESTS . . . TO KEEP MINORITIES FROM VOTING". THIS IS INCORRECT. THIS MISSTATES THE SUPREME COURT CASE IN QUESTION. THE COURT IN KATZENBACH POINTEDLY MENTIONS THAT THE CASE INVOLVED NO EVIDENCE OF RACIAL DISCRIMINATION.

FALSEHOOD 30: (SAME AS ABOVE). THIS IS A GROSSLY UNFAIR CHARACTERIZATION. JUDGE BORK STATED THAT IF THE KATZENBACH DECISION HAD INVOLVED RACIAL DISCRIMINATION, HE WOULD NOT HAVE CRITICIZED IT. HE WOULD VOTE TO STRIKE DOWN ANY DISCRIMINATORY LITERACY TEST.

FALSEHOOD 31: "OPPOSED THE DECISION THAT MADE ALL AMERICANS EQUAL AT THE BALLOT BOX -- 'ONE MAN-ONE VOTE'". THIS IS AMBIGUOUS AND

Incorrect. It seems to imply that Judge Bork opposed the outcome in *Baker v. Carr*, the landmark case that made reapportionment decisions justiciable. In fact, Judge Bork agrees with *Baker*.

Falsehood 32: (same as above). If this language refers to Judge Bork's questions about the need for mathematial perfection in apportionment decisions, it is incorrect to refer to this concern as opposition to "the decision" because there were many such decisions (e.g., *Preisler* 1969, *Karcher* 1983).

Falsehood 33: (same as above). It is unfair to suggest that Judge Bork opposes fairness "at the ballot box." Judge Bork endorses the position of Justices Stewart, White, Rehnquist, and Burger which would sustain a rational state plan that does not frustrate the majority will -- a very fair alternative to mathematical perfection.

Falsehood 34: "Should America go back". If you repeat a falsehood often enough, someone will believe it. Once again this suggests that Judge Bork, who advanced nearly every significant civil right, would somehow send America back.

Falsehood 35: "And refight settled civil rights battles". Judge Bork would not reopen "settled civil rights battles." In fact, he approves of *Brown v. Board* and testified repeatedly that he would respect and sustain precedents in this area.

Falsehood 36: "If Robert Bork is on the Court, we may have to." This ignores his record on the Circuit Court -- the best indicator of his performance on the Supreme Court. As a Judge, he sustained every civil rights law he faced. He struck down a South Carolina voting plan that might have been discriminatory (*Sumter County*), applied the Equal Pay Act to the Foreign Service (*Ososky*, *Palmer*), permitted a discrimination case against the Navy (*Emory*), and punished discrimination against stewardesses (*Laffey*).

FALSEHOOD 37: "NO DAY IN COURT". THIS CREATES THE ERRONEOUS IMPRESSION THAT JUDGE BORK WILL DENY COURT ACCESS TO MERITORIOUS CLAIMS. TO THE CONTRARY, HE HAS GRANTED COURT ACCESS TO THE EXTENT POSSIBLE UNDER CONSTITUTIONAL AND STATUTORY DOCTRINES OF JUSTICIABILITY.

FALSEHOOD 38: "BORK HAS LONG BELIEVED THAT COURTS SHOULD NOT HEAR CERTAIN KINDS OF CASES". THIS FALSELY SUGGESTS THAT JUDGE BORK HAS A "HIT-LIST" OF WORTHY CLAIMS HE WILL NOT HEAR. IN FACT, HE WILL HEAR ANY KIND OF CASE THAT IS JUSTICIABLE. THIS ALSO CREATES THE IMPRESSION THAT JUDGE BORK ALONE HAS THIS PECULIAR "HIT-LIST" [illegible] FALSE LIST OF CASES.

FALSEHOOD 39: "IN 14 OUT OF 14". SELECTIVE STATISTICS. BY SELECTING THE RIGHT 14 CASES, YOU CAN GET 100% FOR ANY PROPOSITION. THE QUESTION THIS OUGHT TO RAISE IS WHO SELECTED THE 14 CASES, NOT THE 100% CONCLUSION.

FALSEHOOD 40: "CONTROVERSIAL CASES". FALSEHOODED STATISTICS. THE ONLY CASES CHOSEN ARE NONUNANIMOUS OR SPLIT DECISIONS. THESE ARE LESS THAN 10% OF JUDGE BORK'S COURT CASES. THERE IS NO SUPPORT FOR THE CONCLUSION THAT CLEAR LEGAL OUTCOMES ARE REQUIRED IN UNANIMOUS CASES. SPLIT DECISIONS ARE COINCIDENTAL BECAUSE THREE-JUDGE PANELS ARE CHOSEN RANDOMLY.

FALSEHOOD 41: (SAME AS ABOVE). THE ANALYSIS OF THE 14 CASES IS SKEWED TO REACH A PARTICULAR RESULT. EVEN SOME NONUNANIMOUS CASES ARE LEFT OUT OF THE SAMPLE TO ENSURE THE PRECONCEIVED RESULT. SOME UNANIMOUS CASES ARE INCLUDED FOR THE SAME PURPOSE. FOR EXAMPLE, HAITIAN REFUGEE CENTER, A UNANIMOUS AFFIRMANCE, IS INCLUDED BECAUSE ONE JUDGE HAD A DIFFERENT RATIONALE.

FALSEHOOD 42: (SAME AS ABOVE) CATEGORIZING CASES, REGARDLESS OF LEGAL ISSUES, BASED ON THE CHARACTERISTICS OF THE WINNERS AND LOSERS IS ILLEGITIMATE AND MISLEADING. ONE EXAMPLE. IN THE

[illegible]
[illegible] AS A
[illegible] CASE AND [illegible] THE "BIG DAY IN COURT"
CATEGORY. THIS CATEGORIZATION IS [illegible] TO SERVE THE INTERESTS OF
THE MUCKRAKERS.

FALSEHOOD 43: (SAME AS ABOVE) THIS CREATES THE FALSE IMPRESSION THAT JUDGE BORK ALWAYS DECIDES CASES ONE WAY. IN FACT, HE AGREED WITH CARTER-APPOINTEE GINZBURG 91% OF THE TIME, WITH CARTER-APPOINTEE MIKVA (AN AVOWED LIBERAL) 82% OF THE TIME.

FALSEHOOD 44: "SOCIAL SECURITY, MILITARY VETERANS, MINORITIES, THE HANDICAPPED, AND THE HOMELESS". FALSE IMPRESSION. THIS LIST OF SYMPATHETIC GROUPS CREATES THE IMPRESSION THAT JUDGE BORK CUSTOMARILY RULES AGAINST MINORITIES AND DISADVANTAGED. IN FACT, JUDGE BORK HAS RULED IN FAVOR OF WOMEN (PALMER, CSOSKY, LAFFEY), HOMOSEXUALS (DOE), BLACKS (EMORY, SUMTER COUNTY), AND HAS NEVER TAKEN A POSITION LESS SYMPATHETIC TO THESE GROUPS THAT THE SUPREME COURT.

FALSEHOOD 45: "BIG BUSINESS IS ALWAYS RIGHT". REPEAT A LIE OFTEN ENOUGH. JUDGE BORK'S RECORD IS ONE OF GREAT SYMPATHY FOR MINORITIES AND WOMEN.

FALSEHOOD 46: "BORK HAS ALREADY MADE UP HIS MIND". CHARACTER ASSASSINATION. JUDGE BORK IS ACCUSED OF HAVING A CLOSED MIND AT THIS POINT. LATER IN THE SAME ARTICLE, HE IS ACCUSED OF BEING TOO OPEN TO CHANGE. BOTH CANNOT BE TRUE.

FALSEHOOD 47: "96%", "5 OUT OF 5", "10 OUT OF 10". SELECTIVE STATISTICS, SEE 39 ABOVE. CHOOSE RIGHT CASES AND YOU CAN GET 100% FOR ANY RESULT. FOR INSTANCE, SEVERAL CASES CHOSEN, E.G., NORFOLK & WESTERN, FEATURE ONE BUSINESS SUING ANOTHER. NO WONDER THAT A BUSINESS WINS.

FALSEHOOD 48: (SAME AS ABOVE) FALSEHOODED STATISTICS, SEE 40 ABOVE. FOR EXAMPLE, DRONENBURG, ONE OF JUDGE BORK'S MOST

CONTOVERSIAL DECISIONS, IS NOT INCLUDED BECAUSE IT WAS UNANIMOUS.

FALSEHOOD 49: (SAME AS ABOVE): SKEWED ANALYSIS, SEE 41 ABOVE. FOR INSTANCE, JUDGE BORK RULES FOR A SMALL BUSINESS IN A SUIT AGAINST THE FEDERAL GOVERNMENT AND IT IS STILL CALLED A "BIG" BUSINESS VICTORY. (CITIZENS COORDINATING COMMITTEE)

FALSEHOOD 50: (SAME AS ABOVE): MISCATEGORIZING CASES, SEE 42 ABOVE.

FALSEHOOD 51: (SAME AS ABOVE): FALSE IMPRESSION, SEE 43 ABOVE.

FALSEHOOD 52: "BOOK ON ANTITRUST LAWS": MISLEADING CHARACTERIZATION OF BOOK. IN FACT, SIX OF NINE JUSTICES OF THE SUPREME COURT HAVE CITED THIS BOOK AND ALL NINE HAVE JOINED OPINIONS CITING IT. THIS IS THE LEADING TREATISE OF ANTITRUST LAW IN AMERICA.

FALSEHOOD 53: "CONGLOMERATE MERGERS": SELECTIVE QUOTING OUT OF CONTEXT. A FULL EXAMINATION OF THE BOOK INDICATES THAT JUDGE BORK'S ENTIRE THEME IS CONSUMER WELFARE. HE INDICATES THAT SOMETIMES ANTITRUST LAWS FRUSTRATE CONSUMER WELFARE.

FALSEHOOD 54: "LOOK PAST HIS RESUME": AN THINLY VEILED ATTEMPT TO SHORT-CHANGE THE INDIVIDUAL WITH THE MOST IMPRESSIVE LEGAL RESUME IN THE COUNTRY.

FALSEHOOD 55: "CONSISTENTLY RULED AGAINST THE INTERESTS OF THE PEOPLE". OUTRIGHT LIE. SEE 22 AND 36 ABOVE.

FALSEHOOD 56: "AGAINST OUR CONSTITUTIONAL RIGHTS": OUTRIGHT LIE. SEE 22 AND 36 ABOVE, JUST FOR STARTERS.

FALSEHOOD 57: "HIS EXTREMIST PHILOSOPHY": HALLOW NAME-CALLING. THE REAL QUESTION IS WHO IS "EXTREME." A FAIR READING POINTS MORE TO JUDGE BORK'S CRITICS THAN TO HIM.

FALSEHOOD 58: "VIEWS SO EXTREME": REPEAT A LIE OFTEN ENOUGH . . .

FALSEHOOD 59: "WHITE HOUSE IMAGE-MAKERS": JUDGE BORK'S FIVE DAYS OF TESTIMONY BEFORE THE JUDICIARY COMMITTEE HAD NOTHING TO DO WITH IMAGE-MAKING.

FALSEHOOD 60: "REPACKAGE": BEFORE HE WAS TOO RIGID, NOW THE INSINUATION THAT HE IS CHANGING. BOTH CANNOT BE CORRECT.

FALSEHOOD 61: "BORK HIMSELF IS CHANGING HIS IMAGE": THIS IS SIMPLY FALSE. MANY OF THE VIEWS JUDGE BORK IS REPUTED TO HAVE CHANGED, INCLUDING HIS VIEWS ON EQUAL PROTECTION AND RESPECT FOR ORIGINAL INTENTION, WERE FIRST ARTICULATED IN 1971.

FALSEHOOD 62: "BORK . . . LOBBYING THE SENATE AND THE MEDIA": IRONIC CHARGE. THE MOST EXPENSIVE LOBBYING CAMPAIGN EVER LAUNCHED AGAINST A JUDICIAL CANDIDATE ACCUSES THE JUDGE OF LOBBYING. IN FACT, HE HAS DONE NOTHING BUT APPEAR, AT THE REQUEST OF SENATORS, TO ANSWER THEIR QUESTIONS.

FALSEHOOD 63: "PEOPLE FOR THE AMERICAN WAY": HYPOCRITICAL. IN A SPEECH BEFORE THE FEDERALIST SOCIETY MONTHS BEFORE THE NOMINATION, TONY PODESTA, DIRECTOR OF PFTAW, ANSWERED THAT HE WOULD SUPPORT ANTONIN SCALIA, ROBERT BORK, OR FRANK EASTERBROOK, IF NOMINATED FOR THE SUPREME COURT.

FALSEHOOD 64: "COMMITTED TO PROTECTING AMERICAN VALUES": HOW IS IT PROTECTION OF AMERICAN VALUES" TO UNDERMINE THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY WITH A POLITICAL CAMPAIGN?

FALSEHOOD 65: "VALUES NEVER FACED A TOUGHER CHALLENGE": JUDGE BORK EMBODIES AMERICAN VALUES. HE IS NOT THEIR ENEMY.

FALSEHOOD 66: "SUPPORT OUR ACTION FUND": FINALLY THE MOTIVES ARE CLEAR. FUNDRAISING. IT CAN BE PROFITABLE TO CREATE A "MONSTER" AND THEN CAST YOURSELF AS THE ONLY KNIGHT -- ALBEIT AN IMPECUNIOUS KNIGHT -- ABLE TO RID THE LAND OF THE SCOURGE.

FALSEHOOD 67: "BORK VS. THE PEOPLE": SEE 1 ABOVE.

Senator HATCH. What I would like to do is just go through a few of them. Take number 21, where it says, quote: "Use of contraceptives by married couples a punishable crime." Unquote. Clearly put in there to be inflammatory, because this leaves the impression that married couples were convicted of such a crime.

The CHAIRMAN. Excuse me, Senator. Do you have a copy of these, so I can take a look while you are going——

Senator HATCH. Yes. I do.

The CHAIRMAN. Thanks, because I cannot see yours.

Senator HATCH. I sure do. We will give you that copy.

The CHAIRMAN. Thanks.

Senator HATCH. Now Judge Bork—as he mentioned—he said that this "nutty"—as he described it—Connecticut statute was never used at all to punish any married couple for the use of contraceptives.

Take number 22 here. It says: "Turn back the clock on civil rights." Big print. Actually, it is unfounded slander, libel in this case. Judge Bork has advanced the cause of civil rights in all of his public-service capacities.

He has never, quote, "turned back the clock," unquote.

He has advocated, as a Solicitor General, or he has rendered as a judge a judicial decision on the D.C. Circuit Court of Appeals. He has never done anything that was less sympathetic to the minority groups of this country, or female plaintiffs than a majority of the Supreme Court itself.

And as Solicitor General, Judge Bork won several significant advances for civil rights, including prohibition of private, discriminatory contracts in *Runyon* v. *McCrary*, and redistricting to enhance minority voting strength in the *United Jewish* v. *Carey* case.

You could just go on to—let me just go to a couple more. Twenty-seven. Poll taxes, which is right down here.

Quote. "Poll taxes, to keep minorities from voting." Unquote.

Now that is incorrect. This misstates the Supreme Court case in the question. The Court, in *Harper,* pointedly mentions that the case involved no evidence of racial discrimination.

Falsehood 28. This is a grossly unfair characterization. Again, it is the same as the above. Poll taxes are to keep minorities from voting and that he supported those.

Judge Bork stated that if the *Harper* decision had involved racial discrimination, he would not have criticized it.

He would have voted to strike down the discriminatory poll tax.

Number 29. Literacy tests. It says, quote: "Literacy tests to keep minorities from voting." Unquote. Again, incorrect.

This misstates the Supreme Court case in question. The case in *Katzenbach* pointedly mentions that the case involved no evidence of racial discrimination in that case.

Falsehood 30. This is, again, a grossly unfair characterization. Judge Bork stated that if the *Katzenbach* decision had involved racial discrimination he would not have criticized it.

He would have voted to strike down any discriminatory literacy test. Go to number 39. There are so many here, that I just have to pick and choose.

It says here, it says, "Falsehood 39: In 14 out of 14 cases"—that was the quote. This is selective statistics. By selecting the right 14 cases you can get a 100 percent for any proposition.

What this question ought to raise is who selected the 14 cases, not the 100 percent conclusion. Let me just go to two more and then I will quit.

Falsehood 63.

Senator HEFLIN. Would you point that over here toward the other side.

Senator LEAHY. Show it to Judge Heflin, too, Orrin.

Senator HATCH. I would be glad to do it.

Falsehood number 63. It is, quote: "People For The American Way," unquote.

Well, in a speech before The Federalist Society just months before the nomination, Tony Podesta, who was the director of the PFTAW—People For The American Way—the acronym—answered that he would support Antonin Scalia, Robert Bork, or Frank Easterbrook, if nominated to the Supreme Court. Now this was the head of this organization, just a few months before Robert Bork was nominated.

Just let me give you one last one. That is number 66 right here, where it really comes down to why this ad was put in to begin with.

It says, in number 66: "And support our action fund. Robert Bork versus the People. Don't let it reach the Supreme Court." Treating him like a nit. And to make a long story short, you can see what the motives are. The motives are very clear. They are fund-raising, and I think they have done it through the most distortionate ad I have seen in a long time.

Now I have to admit that conservatives occasionally put out ads like this, in fact more than occasionally, just like liberals; but they ought to be called what they are.

But that is one reason why people in this country may have had some questions about Judge Bork because they see things like this and think that because it appears in the newspaper it may be right.

Let me just end with these thoughts, and then I will give up the floor.

The CHAIRMAN. Do you want me to hold that for you?

Senator HATCH. Yes, if you want to. It is great to have a Chairman who is fair. That is all I can say.

Senator LEAHY. Are we under the 15-minute rule now?

The CHAIRMAN. The Senator has time.

Senator HATCH. Well, I might mention that Senator Kennedy took 20, and others have taken 10. I am just going to take about 8.

In conclusion, I only regret that this serious decision of deciding a Supreme Court nominee is encumbered by the crassest of political tricks and approaches.

The courts have always been our most nonpolitical branch of government, and the judges have always made decisions without worrying about their opinions appearing in this kind of garbage, and that is what it is. This kind of tabloid journalism.

If judges have to start worrying about politics, appearances, and misleading headlines, what is going to happen to justice in this country?

Now that worries me, and it ought to worry everybody else. This kind of political tactic, accompanied by fund-raising, lobbying, and misleading distortion has no place in this constitutional process.

I look at what the continual raising of Watergate, and particularly this issue, as being in the same category as this ad. And the reason I do is because you have more than adequately explained it time after time after time, you have done it here today, and, frankly, the end result of what Judge Bork did then, as Acting Attorney General, the end result was to get Leon Jaworski who did, I think, about as good a job as anybody could have done in resolving that very, very difficult set of problems.

Do you have any comment about that?

Mr. RICHARDSON. Thank you, Senator Hatch. May I make one brief comment, Mr. Chairman?

The CHAIRMAN. You can comment on all 67 points, if you want. [Laughter.]

Mr. RICHARDSON. Let me give them to you.

The CHAIRMAN. I must say, in my time here, I have never seen such a distinguished prop as you, sir, being used in this, but please——

Senator HATCH. I have never seen such a terrible ad.

Mr. RICHARDSON. I would be far more disturbed by the ad you have just exhibited, Senator Hatch, were it not for the fact that the question of confirmation of Judge Bork is not being entrusted to a popular referendum, but to the Senate of the United States, and I have such confidence in the Senate of the United States, that I am sure all of its distinguished Members will study the hearings, will give due weight to the testimony of Judge Bork which of course explodes most of those allegations, and will therefore, having weighed the merits, conclude that notwithstanding adventitious propaganda from the outside, he deserves the advice and consent of the Senate.

Senator HATCH. I hope you are right, sir. I hope you are right.

The CHAIRMAN. Before I yield to the Senator from New Hampshire I will just point out one fact.

Notwithstanding the ads, which we will have plenty of time to debate, I am sure, I would point out that up until the public became bored with these hearings, which I guess was about the same time we became bored with them, the beginning of this——

Mr. RICHARDSON. I am sorry I did not get here in their heyday.

The CHAIRMAN. The fact of the matter is, millions of people were able to watch for themselves, firsthand, Judge Bork testifying.

I suspect many millions more than read these ads. And I would also point out that during this period there was a lot of coverage in the press, quote, "the free press," beyond these ads. So notwithstanding the fact they may or may not have an impact, I would suggest that their impact, to the extent they had any, pales by comparison to this being televised live, televised late, and televised in part by all the networks, by everyone for the past 10 days.

And Judge Bork had an opportunity to sit for 4 days, or thereabouts, and make his case to the American public.

So to the extent that the public has reacted or has not reacted, I would suggest that it would be giving much too much credit to the paid advertising media, to suggest that the reaction was a consequence of merely ads, correct or incorrect.

At any rate, having said that, let me yield to our—we have two more questioners, I beg your pardon—to the Senator from New Hampshire, and suggest that we will end for an hour——

Senator **Leahy**. You mean the Senator from Vermont, first, don't you?

The **Chairman**. I am sorry. I beg your pardon. The Senator from Vermont, first. I am moving from my right to my left. After the next two questioners, we will recess, I would suspect, until 2:15.

We will try to recess for one hour.

Senator **Humphrey**. Mr. Chairman, excuse the interruption, but there are three members waiting for——

The **Chairman**. Oh, I am sorry. I did not realize you have not—as I have throughout, every Senator will have an opportunity to question, but I am just telling you that the next panel can go to lunch.

Those waiting, you can go to lunch, and it will be approximately an hour after the last Senator questions Attorney General Richardson, that we will reconvene.

The Senator from Vermont. Then the Senator from Wyoming, the Senator from New Hampshire, and any other Senator who wishes to come back and speak.

Senator **Leahy**. Thank you, Mr. Chairman. I will not go down through a long defense of the People For The American Way. Senator Hatch has an inimitable way of going after them. They are well able to speak for themselves, and I am sure will.

I will note only this, however. That there has been unparalleled lobbying on both sides, and there has been fund-raising done by those for Judge Bork, and those against Judge Bork. I have stated before how I feel about this. I have also noted that I have declined all invitations to meet with the professional lobbying groups for him, or against him.

We are now weighing our preprinted postcards and letters for and against him. I mean that literally. We weigh them. We do not read them, but weigh them. What I am paying attention to are those letters where people have actually written their own, from the State of Vermont, for him, and against him, and any individual in the State of Vermont who has sought me out in my weekends up there, for or against him, speaking as an individual, I have listened to them.

But I agree, as our distinguished witness, Mr. Richardson, has said, and as the distinguished Chairman has said—we will make up our minds, as members of this committee, based on what we hear in this committee room.

Judge Bork spoke at unprecedented length and unprecedented detail. That, actually, will influence our thinking, I would hope, of individual Senators, more than all all other witnesses put together, because after all, that is the most important of all of the witnesses.

I would also note that in that regard—it is my own personal feeling—I would hope when we finish, that each one of us will announce how we will vote, and vote, and announce our reasons for it, because I think that is important to the whole Senate. But that is an individual thing.

The most important thing is that it has been also announced that this matter will be debated on the floor of the Senate. Every single Senator will have a chance to express his, or her view, and again, it is the views of the one hundred, based on what they have heard, actually, from the witnesses, who will carry the day one way or the other, not what the individual lobbying groups do.

Now, Mr. Richardson, in response to a request from this committee, the Justice Department made available a great many documents from the Watergate period.

One of these was a letter dated August 13th from Philip Lacovara, who was then counsel to the Special Prosecutor, Archibald Cox. Let me just read the pertinent paragraph. It was to then-Solicitor General Bork.

He says: "Since I understand that the Attorney General has asked you to help coordinate the positions being taken by various units of the Department of Justice on the issue of executive privilege, you will be interested in the enclosed memorandum filed today dealing with that subject in the context of a grand-jury subpoena addressed to the President."

Now this was years ago, I realize, but do you recall asking then-Solicitor General Bork to coordinate the positions taken by the Justice Department on the issue of executive privilege?

Mr. Richardson. I have a general recollection of it, Senator Leahy. I certainly would not have remembered that letter.

Senator Leahy. No, nor I expect that particular one I did note on the diaries, the log kept in your office. As Attorney General, you had a meeting on August 15 with Solicitor General Bork and Mr. Lacovara, as noted, to discuss executive privilege.

Again, I am not sure I would remember a particular meeting that I had on August 15th of this year, to say nothing about August 15th back then.

But does that in any way seem right? I mean, do you——

Mr. Richardson. Yes. It certainly is consistent with the kind of approach I would have taken to try to assure that the left hand knew what the right hand was doing, and that we were, so far as possible, applying consistent principles to the positions we took on executive privilege or, for that matter, most anything else.

I was at that very time also trying to come up with ways of assuring consistency in the Department's approaches to the government's responsibilities toward information, and so I do not know—there certainly would have been situations in which our responsibilities as lawyers, on one side of a case, might be——

Senator Leahy. But calling in Solicitor General Bork to coordinate the work on executive privilege, in August of 1973, was that because the dispute over the release of the White House tapes was already beginning to bubble to the surface?

Mr. Richardson. Oh, yes. Well, that of course had been a problem. I forget when the subpoenaed tapes first arose. But the question in general, of the availability to the Special Prosecutor of the President's personal memoranda, documents, things like this, was a problem that had arisen very early on in my own conversations with the President's counsel, Fred Buzhardt.

And by August, I was beginning to think of myself as—in Brandeis's phrase—the lawyer for the situation. I was neither the Special Prosecutor nor counsel to the President, and kind of a bridge, trying to assure that the whole process was conducted with fairness and consistency.

Senator LEAHY. So that my final question is that then it would be fair to say that Judge Bork was well aware, in August, of the brewing constitutional dispute—certainly well aware of the brewing constitutional dispute over the tapes before your resignation as Attorney General on October 20th, 1973?

Mr. RICHARDSON. Well, I am sure he was. He had no direct role in any of that. But I had learned already to have great respect for him as a lawyer, especially in dealing with constitutional issues.

I had worked very closely with him, or was then working very closely with him on the issues presented by the *Agnew* case, which I might add, from my point of view, was a substantially more difficult problem than anything I had to deal with in Watergate.

And so I am sure I called on him just because I thought that these were positions in which—of course as you well know, the Solicitor General ends up at some eventual stage deciding what shall be the position of the United States in litigation in the courts of appeals.

And so he has a concern, then, for the avoidance of inconsistency, if possible. So it seemed like an appropriate way to use his expertise and his role.

Senator LEAHY. Thank you, Mr. Chairman, Mr. Richardson. It is good to see you back here in these halls. Good to see Mrs. Richardson here, too. Thank you.

Mr. RICHARDSON. Thanks very much, Senator.

The CHAIRMAN. The Senator from Wyoming.

Senator SIMPSON. Thank you, Mr. Chairman, and it is great to see you here today, Elliot Richardson, and always a great pleasure to hear you speak and hear you state yourself with such clarity as you do. You are a superb citizen, and you have been—everything that your country asked of you, you performed. You have done that, and you have done it well. I admire all of those things in you. Indeed, whenever you were asked, you responded.

A particularly powerful statement, and particularly page four, where it says: "In my judgment, the clarification of his views has now emerged as entitled to be taken at face value. To treat it otherwise would be both insulting and implausible; insulting because no foundation whatsoever has been laid for impugning his fidelity to the truth." Boy, that says it all. And that is what he said here. He said he would do what he would do, and he was here for 32 hours, plus, saying that, under oath, and under the most compelling of reasons, when presented with the accusation of some kind of confirmation conversion, he said he would not allow himself to be disgraced in history.

That is what he said. That is the most compelling of personal views. It is the marvelous ability which keeps me going, hopefully forever in this arena—not forever. I do not want to stick around this place that long. It is a fascinating place to work.

But I think we can count, that when a man is under oath, and says what he says, unless there is some background, that we take it as truth.

And then to have these rather—and I say there is a touch of arrogance when they come to speak about what he said, or that he did not mean it.

Boy, that is effrontery, that is arrogance personified in my mind. And so he has said what he has said, and there is no reason at all to believe that that would not be the case.

What Senator Hatch has shared with you, with us, is the kind of guff that we have had to struggle through in this confirmation, and that is the written part.

Gregory Peck is doing some heavy hitting out there that is awesome in its distortion, and we will just have to watch that.

But I think, you know, just for me, I think that they have gone too far, and as we get to the balance of 86 other Senators participating in this remarkable exercise, we are going to find the thoughtful centrists who will be able to add the real essence to the debate that perhaps the fourteen of us do not bring to it.

And in the course of it they are going to say, I read that, and then, I heard that debate and they lied. And that is the way it works in America. And then they are going to generate to the underdog, the guy who got smacked in the chops with a bunch of total phoney-baloney accusations, that do not fit anything. Well, enough of that.

I want to say, that in the midst of all this, and the Watergate issue—you know—really, you have hopefully laid that to rest. It should have been laid to rest many years ago.

Two hearings were held here with this man who had participated in this situation, and nothing further ever came of it. And then to bring that, you know, gasping cadaver back from the edge of the final tank is really a gross activity in itself.

But now a kind word, here and there. Do you remember I said yesterday, Mr. Chairman, and you joined me in talking about the right of privacy, and I cited that publication and you had some feelings of your own.

I said, jocularly, that my friend Mort and Jerry ought to get aboard and help on that, and typical of them—and I have enjoyed them both thoroughly. What fun to bounce brains with them. Mort Halperin and Jerry Berman. And they were a great assistance to me in many ways in the immigration activity, and they were detractors, too, but always up front.

I want to place in the record a letter from the American Civil Liberties Union to the editor of that paper I spoke of, sharing their displeasure, and the fact that they were appalled that such a list was made available to the reporter, that they obtained a video list, and the discussion of Judge Bork's character based upon the movies he watches at home, and the fact that it was leaked.

"We believe it wholly unethical to make public such a list." They believe the Bill of Rights grants people a protectable privacy right in personal information. As Judge Bell said, the right to be left alone.

And again, with the enormous third-party information reservoirs that are in the land. But in any event, it is a very fine letter, and they do not condone that, and "Judge Bork is entitled to live certain parts of his life outside of the public eye, and not even our curiosity about him justifies this intrusion into his personal affairs."

It is signed by Mort Halperin, the director, and Jerry Berman, chief legislative counsel.

I want to commend them. That is the ACLU I knew when I was a member of it many years ago, and I got out only because of the Skokie, Illinois situation. Many did. They do good things, and they do some things I do not agree with.

But that is a remarkable statement and I ask that it be put in the record.

The CHAIRMAN. Without objection, it will be placed in the record.

[Letter follows:]

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON OFFICE

122 Maryland Avenue, NE
Washington, DC 20002
(202) 544-1681

National Headquarters
132 West 43rd Street
New York, NY 10036
(212) 944-9800

Norman Dorsen
PRESIDENT

Ira Glasser
EXECUTIVE DIRECTOR

Eleanor Holmes Norton
CHAIR
NATIONAL ADVISORY COUNCIL

MEMORANDUM

TO: Senator Alan K. Simpson

FROM: Morton Halperin, Director
Jerry Berman, Chief Legislative Counsel
American Civil Liberties Union, Washington Office

DATE: September 28, 1987

RE: Letter to the editor of City Paper

We thought you might be interested in this letter, which we sent to City Paper today.

AMERICAN CIVIL LIBERTIES UNION

WASHINGTON OFFICE

122 Maryland Avenue, NE
Washington, DC 20002
(202) 544-1681

National Headquarters
132 West 43rd Street
New York, NY 10036
(212) 944-9800

Norman Dorsen
PRESIDENT

Ira Glasser
EXECUTIVE DIRECTOR

Eleanor Holmes Norton
CHAIR
NATIONAL ADVISORY COUNCIL

September 28,1987

Editor, City Paper
917 6th Street, N.W.
Washington, D.C. 20001
Attn: Jack Shafer

Dear Editor, City Paper:

In City Paper's cover story of September 24, you announced that you had obtained from a local video store a list of videos rented by Judge Bork and his family. Your article included the video list and a discussion of Judge Bork's character based on the movies he watches at home. You claimed that an employee of the video store "leaked" the list to your reporter.

The American Civil Liberties Union (ACLU) is appalled that such a list was made available to your reporter. We believe that it was wholly unethical for the video store to make public Judge Bork's video rental list, particularly in light of the fact that Judge Bork did not consent to the disclosure.

The ACLU believes that the Bill of Rights grants people a protectable privacy right in personal information. However, we live in a society in which an enormous quantity and variety of personal information is held in the hands of third parties such as banks, credit and insurance companies, schools. We are virtually unable to avoid giving over information about ourselves in exchange for goods and services.

Although there are few laws which prohibit private third parties from disclosing personal information, the right of people to maintain some control over their lives should be respected by those with whom they do business.

The nomination of Judge Robert Bork to the United States Supreme Court is one of the most serious issues confronting our nation today. But we cannot condone the rental list "leak" as a legitimate means of determining Bork's character, just as we would not condone the breaking into his home to find out what books he reads. Judge Bork is entitled to live certain parts of his life outside of the public eye, and not even our curiosity about him justifies this intrusion into his private affairs.

Sincerely,

Morton Halperin
Director

Jerry Berman
Chief Legislative Counsel

MH/JB/cm

The **CHAIRMAN**. Anything else?

Senator **SIMPSON**. No, Mr. Chairman. I would just ask one question, which is: What does a vacated order mean, Elliot Richardson?

Mr. **RICHARDSON**. It means an order that has been rescinded, is of no further force or effect.

Senator **SIMPSON**. And just scrubbed?

Mr. **RICHARDSON**. Scrubbed. Yes. Good word.

Senator **SIMPSON**. Nothing to it. Void. That is what happened to Judge Gesell's order, and we all know that, but sometimes I think it is good to hear others say what vacating an order means, and have you ever seen one vacated by the prevailing party, like that one? I mean, they requested it be vacated.

Mr. **RICHARDSON**. The case, as I understand it, was regarded as moot in the court of appeals, and so that meant there was no case or controversy to be addressed under Article III of the Constitution.

So the case was then treated as if it had never been.

Senator **SIMPSON**. Thank you so much, and thank you, Mr. Chairman, for your courtesy.

The **CHAIRMAN**. Thank you. Senator Grassley.

Senator **GRASSLEY**. Mr. Attorney General, I thank you for coming here and telling us about Judge Bork, and bringing a breath of fresh air to these hearings, and a fairness that I think this committee ought to have as our example.

We have heard an awful lot today, and I guess every day, about whether or not Judge Bork is outside of the mainstream, I think that some of those making that criticism do not know the difference between mainstream and the jet stream, but that is beside the point.

I want your view, whether or not you consider Judge Bork outside the mainstream.

Mr. **RICHARDSON**. I certainly do not consider him outside the mainstream. I do not particularly like the phrase, by the way.

To me, a better way of looking at it is to picture positions taken by judges and constitutional authorities as being distributed along a bell curve, and the ones most often expressed would be reflected by the peak of the bell curve, and the extreme positions that have very little support, or recognition anywhere, would be at the very far ends of the bell curve.

And you could decide at what point on the slope you would disregard, or consider actually disqualifying, in the case of a Supreme Court nomination, positions outside that point.

I am satisfied, on the basis of Judge Bork's testimony, that his positions fall well within the range of those that have to be treated with respect, and that are entitled to be represented, as I have said, on the Court.

Any other member of the Court who cannot handle the quality of the reasoning he would bring to bear in support of those positions in a given case should not be on the Court, him, or herself.

It is a process of give and take, and what he will bring is a point of view, of philosophy, and a depth of knowledge that deserves to be on the Court.

As I have said, even though I might find myself in disagreement with him, it would be always with appreciation of the intelligence with which he had presented and advocated his point of view.

Senator **Grassley**. To whom did you make the promise not to fire the Special Prosecutor?

Mr. **Richardson**. The Judiciary Committee of the United States Senate, and to Cox himself.

Senator **Grassley**. Judge Bork testified before this committee, that he believes you took the right position.

What was the position of Deputy Attorney General Ruckelshaus regarding the dismissal of Mr. Cox?

Mr. **Richardson**. His position and mine were essentially the same, both on the issue of Cox's entitlement to reject the conditions imposed on his access to tapes by President Nixon.

We also were in the same position toward my commitment to this committee, although Bill Ruckelshaus did not come on board as my deputy until after that. He was my deputy in the fullest sense of the word. He was a true alter ego, and so he felt, and I felt, that he shared whatever constraints I was subject to myself.

Senator **Grassley**. Do you believe that the discharge of the special prosecutor in any way hampered the investigation or the prosecutions of the Watergate Special Prosecutor Force?

Mr. **Richardson**. No. And I think that that answer is——

Senator **Grassley**. You know what I hope comes out of this hearing? I hope that your testimony puts to rest the non-issue of the Watergate matter and puts it to rest once and for all.

Mr. **Richardson**. I hope so, Senator. Thank you.

Senator **Grassley**. Thank you very much for your time.

The **Chairman**. Senator Humphrey.

Senator **Humphrey**. Thank you, Mr. Chairman.

Mr. Attorney General, welcome. The Chairman correctly noted that the American people have grown bored with these hearings. It is little wonder they should grow bored when we go back 14 years to an event that has been aired and re-aired and re-re-aired many, many times since then. It is little wonder the American people would grow bored with this obviously partisan proceeding when the opponents raise once again charges—that is, those in connection with the Cox affair—when the opponents raise charges in connection with the Cox affair that were thoroughly aired, which were raised and thoroughly aired just 5 years ago in connection with the confirmation of Robert Bork to the D.C. Circuit Court of Appeals. These charges connected with the dismissal of Archibald Cox were raised in 1982, considered by this committee, presumably considered by all Senators, and dismissed if you look at the vote, which was unanimous in favor of his confirmation.

That these charges would be dredged up once again to me shows the opponents will stoop to any level to defeat the nominee. And I want to make a prediction that I think was implicit in what some of my colleagues said a moment ago: that this junk is going to backfire. The opponents have gone too far. We saw it last night when they dragged a hapless witness before us who by innuendo accused Judge Bork of anti-Semitism and insensitivity to the concerns of various ethnic groups. We see it in the raising once again of these Watergate charges.

But just for the record, since you have been kind enough to come before us, Mr. Attorney General, would you answer this in whatever fashion you wish. In connection with the dismissal of Archibald Cox and ultimately the replacement of Mr. Cox with Leon Jaworski, did Robert Bork in any way act unethically?

Mr. RICHARDSON. No. Clearly not, in my view.

Could I add one brief comment? I must say I am struck, to use a neutral word, by the extent to which the question of boredom or not is becoming pertinent to the deliberations of the United States Senate. It implies almost that you exist in order to entertain.

I am sure, Mr. Chairman, that is not the view that you hold or any of your colleagues hold. It is not, then, the question of whether it is boring or not; it is immaterial. The question is whether or not the testimony you are receiving is material.

The CHAIRMAN. And I think your testimony is material, and if boredom were the measure of our worth of our efforts here, it would be not worth very much. Not only here but in the Senate, much of the hardest work and most important work is boring.

Mr. RICHARDSON. Exactly.

The CHAIRMAN. The point I was making is we have an obligation to do this job. I have, as Chair, tried to do it as fairly and thoroughly as possible. Your testimony has added greatly to our deliberation.

Are there more questions?

Senator HUMPHREY. I would hope so.

The CHAIRMAN. I am sorry.

Senator HUMPHREY. I have only used about a minute of my time. No more minutes have elapsed.

The CHAIRMAN. I beg your pardon. You can have as much time as you want.

Senator HUMPHREY. Thank you.

The CHAIRMAN. Please continue.

Senator HUMPHREY. To try to get back on track, we were talking about the conduct of Robert Bork in the dismissal of Archibald Cox and the replacement of Cox with Leon Jaworski.

You find nothing unethical in any way in the conduct of Robert Bork in that matter; is that correct?

Mr. RICHARDSON. That is correct, Senator Humphrey.

Senator HUMPHREY. Do you suppose that there ought to be a higher standard of ethical conduct required of the nominee to the Supreme Court than the standard of ethical conduct required of a nominee to the circuit court?

Mr. RICHARDSON. No. I do not think ethical standards vary with the level of the court. Indeed, given observance of rather basic standards on the part of any judge, a judge does not spend much of his time worrying about ethics. He has got cases to decide.

Senator HUMPHREY. The point I was trying to make is that if the Senate took into account, as it should have, Judge Bork's ethics, Robert Bork's ethics in the Cox affair, when he came before this committee as a nominee to the circuit court, if the Senate took that into account, as I am sure it did, and found that his standards of ethics were without question such that it confirmed him to the D.C. Circuit Court of Appeals, then why in the world are we hearing these charges once again that Bork's conduct was unethical? We have already decided that question, and that we should resurrect that question and that charge to scoop up another handful of that mud and again to place the nominee in jeopardy a second time I think is not flattering to the opponents of the nominee?

Senator **Simpson**. What was your comment? Excuse me.

Mr. **Richardson**. I was going to say, Senator, you asked why is this happening. I can only guess that there are people who oppose the nomination and will use anything they can lay their hands on to try to block it.

Senator **Humphrey**. Are you suggesting that has happened?

Mr. **Richardson**. Yes, clearly. Senator Hatch has already given us one example of that, and I think you are correct in saying that there is no basis for questioning Judge Bork's integrity or his commitment to the highest standards of ethical conduct.

I agree that this was, as it should have been, an issue in his confirmation for the Court of Appeals for the District of Columbia, and I do not believe that there is any legitimate question on that score before this committee or the Senate as a whole.

Senator **Humphrey**. Thank you. One last question, Mr. Chairman.

In your testimony, Mr. Attorney General, you say that, "I am also satisfied that to portray him as bent on enshrining his every past utterance in some future majority opinion is worse than a caricature; it is a distortion."

Are you suggesting likewise that the opponents have caricatured Robert Bork and distorted his——

Mr. **Richardson**. Yes, I am suggesting that. I am saying that they continue to attack his positions as if he had not testified. They have been willing to extract from whatever he said over a long career as a professor, commentator, statements that he has said do not reflect his present views or, as the case may be, do not reflect the approach he would take to his responsibilities as a Supreme Court Justice.

I think, as I have said, that when he declares himself in that manner, his statements should be believed. As I go on to say, I think that not to treat them as believable, not to accept them, is both insulting to Judge Bork and, in any event, not plausible, because it is far more plausible in all the circumstances that what he is telling you now is, in fact, a clear, accurate and conscientious depiction of his actual views.

It is, as I say, natural that these views should have been modified in the course of a lifetime of hard thought about these issues of constitutional law. It is also true that an individual faced with the responsibilities of serving on the Court will look at these questions differently than he would have looked at them as a professor.

One of my favorite axioms was one I learned when I was serving as Assistant Secretary of Health, Education and Welfare under President Eisenhower. We had a very senior civil servant in the department then named Rufus Miles. Rufus Miles, if he wasn't the author of Miles' Law, is the man I have always associated with what I call Miles' Law. It goes: How you stand depends on where you sit. And you are sitting in a different place when you are lecturing to students or writing provocative Law Review articles than when you are sitting—when you are staring at the prospect of voting on matters of vital concern to the American people in the capacity of a Supreme Court Justice of the United States.

Senator HUMPHREY. Well said. Thank you, sir.

The CHAIRMAN. General, do you think that we should not consider the views that he has not changed during his testimony.

Mr. RICHARDSON. No, of course not.

The CHAIRMAN. And I assume you would not argue with the proposition that, notwithstanding the fact he may firmly hold the views he has now stated, that if there is a pattern of significant swings and shifts in those views over the years, notwithstanding he firmly holds them now, they very well might change again. We should look at the past as prologue, should we not?

Mr. RICHARDSON. I think you should look at the past as the prologue. No one could quarrel with that as a general observation. But I also think that the best evidence you have as to his views is the testimony he has given here.

May I make one more general observation? I know it is getting late, but the reason I quoted Judge Hand and cited Judge Hand's position on the Bill of Rights, this little book, is that the question of the judicial function is the hard question.

The CHAIRMAN. That is right.

Mr. RICHARDSON. My old boss, Felix Frankfurter, was vilified in his day by his former liberal friends because they thought he had switched his position simply because, in fact, what he had done was to exercise restraint in using the power of the Court to strike down challenged actions when his liberal friends would have liked to see him do that.

I certainly became sensitive then to the fact that the question of how far a court should go in disturbing the actions of State governments or the Congress of the United States or the executive branch is a question that is never going to be settled in a static manner. And no one has thought harder about that kind of problem among living judges than Robert Bork. His analysis of it, his point of view toward it, in my view, belongs on the Court.

If I were there too, as I said, I might end up disagreeing with him a lot of the time, but I would not say that he should not be there for that reason. You are dealing with a question of disqualification. The burden of proof at this point, it seems to me, is on showing that something in his record, something in his character, something in his positions, forces you to the conclusion that this man does not belong on the Court. I do not see how that conclusion can be reached on this record.

The CHAIRMAN. Well, it seems to me that you and I, I clearly understand our areas of agreement, and I now clearly understand our areas of disagreement. The fact of the matter is I believe the role of the Senate and the Senator in making a judgment of who should or should not be on the Court is not limited to merely whether or not the character is sufficient. Your judgment as a sitting Senator, were you to be here, would be that that view, although you disagree with it on a judicial function, is one that should be represented on the Court. My view is that it should not be represented on the Court. I doubt whether you would question my right to hold that view or my right as a Senator to make that judgment.

Mr. RICHARDSON. Clearly not.

The CHAIRMAN. I thank you very, very much. You really have enlightened these hearings. It was a pleasure having you here, and we will recess until 2:30 p.m., at which time the next panel will come forward.

[Whereupon, at 1:31 p.m., the committee recessed, to reconvene at 2:30 p.m., the same day.]

AFTERNOON SESSION

Senator **Metzenbaum**. The hearing will come to order.

Before we move on to the next regularly scheduled panel, let me introduce three distinguished Members of Congress. First, Congressman John Conyers, Jr.; as many of us know, Representative Conyers is chairman of the House Subcommittee on Criminal Justice. Second, Congressman Mervyn Dymally, chairman of the Congressional Black Caucus. And third, Walter Fauntroy who so ably represents the District of Columbia.

Gentlemen, we welcome you here today. I do not know whether or not the chairman has established any time limits. One does not normally provide time limits for Members of Congress, but we have a tremendous agenda before us yet today. If you could confine your remarks to 5, 6, 7, minutes, we would be very grateful to you.

Congressman Conyers, your name was listed first so I will call upon you first.

STATEMENT OF A PANEL CONSISTING OF HON. MERVYN DYMALLY, HON. JOHN CONYERS, JR., AND WALTER E. FAUNTROY

Mr. **Conyers**. Mr. Chairman, if you do not mind, would you allow the chairman of the Congressional Black Caucus to make prefatory remarks.

Senator **Metzenbaum**. Whatever is your preference. We are very happy to have Congressman Dymally with us.

Mr. **Conyers**. Thank you.

Senator **Metzenbaum**. I just was reading some notes, and your name happened to be the first one up. I guess it was in alphabetical order. But, Congressman Dymally, please proceed. Glad to have you with us.

Mr. **Dymally**. Mr. Chairman, members of this distinguished committee, it is my honor, more appropriately my duty, as chairman of the Congressional Black Caucus to bring my colleagues before you to express the unequivocal opposition of the caucus and our constituents to the nomination of Judge Robert Bork. Only 4 days ago, more than 20,000 black Americans converged on the nation's capital for the Congressional Black Caucus 17th annual legislative weekend. Throughout those proceedings, a total of more than 67 seminars, there was a single resounding theme: the demand for the rejection of the Bork nomination.

My colleagues on the Congressional Black Caucus and I represent men and women of diverse geographic regions, philosophical and political orientation. Yet there has been no variation on the message which we have received. Those who believe in the absolute integrity of the Constitution and its guarantees view a Bork appointment to the Supreme Court as an act which imperils the very existence of our individual freedoms.

We come here today in express opposition to one who threatens to trample the democratic spirit. We believe this is not just another political appointment but the selection of an individual who could well change the face of American civil liberties for years to come.

Those who argue that this process is above politics ignore the reality of the society in which men and women of the bench exist. We respectfully request that this body on behalf of we the people not allow our Constitution to be jeopardized or victimized by a wave of judicial review of its very intents and purposes.

Mr. Chairman, I bring to you my colleagues, Congressman John Conyers and Congressman Walter Fauntroy, to explain in detail the Congressional Black Caucus opposition to the nomination of Judge Bork.

[Prepared statement follows:]

Introductory Statement
Senate Judiciary Committee - Bork Confirmation

CONGRESSMAN MERVYN M. DYMALLY
Chairman
Congressional Black Caucus

September 29,1987 - Russell Senate Office Building - Room 325

MR. CHAIRMAN, MEMBERS OF THIS DISTINGUISHED COMMITTEE, IT IS MY HONOR -- BUT MORE APPROPRIATELY -- MY DUTY AS CHAIRMAN OF THE CONGRESSIONAL BLACK CAUCUS TO BRING MY COLLEAGUES BEFORE YOU TO EXPRESS THE UNEQUIVOCAL OPPOSITION OF THE CAUCUS AND OUR CONSTITUENTS TO THE NOMINATION OF JUDGE ROBERT H. BORK. ONLY FOUR DAYS AGO, MORE THAN 20,000 BLACK AMERICANS CONVERGED ON THE NATION'S CAPITAL FOR THE CONGRESSIONAL BLACK CAUCUS' 17TH ANNUAL LEGISLATIVE WEEKEND. THROUGHOUT THOSE PROCEEDINGS - A TOTAL OF MORE THAN SIXTY-SEVEN EVENTS - THERE WAS A SINGLE RESOUNDING THEME, THE DEMAND FOR THE REJECTION OF THE BORK NOMINATION.

MY COLLEAGUES IN THE CONGRESSIONAL BLACK CAUCUS AND I, REPRESENT MEN AND WOMEN OF DIVERSE GEOGRAPHIC REGIONS, PHILOSOPHICAL AND POLITICAL ORIENTATION. YET THERE HAS BEEN NO VARIATION ON THE MESSAGE THAT WE HAVE RECEIVED. THOSE WHO BELIEVE IN THE ABSOLUTE INTEGRITY OF THE CONSTITUTION AND ITS GUARANTEES VIEW A BORK APPOINTMENT TO THE SUPREME COURT AS AN ACT WHICH IMPERILS THE VERY EXISTENCE OF INDIVIDUAL FREEDOMS.

WE COME HERE TODAY IN EXPRESS OPPOSITION TO ONE WHO THREATENS TO TRAMMEL THE DEMOCRATIC SPIRIT. WE BELIEVE THIS IS NOT JUST ANOTHER POLITICAL APPOINTMENT, BUT THE SELECTION OF AN INDIVIDUAL WHO COULD WELL CHANGE THE FACE OF AMERICAN CIVIL LIBERTIES FOR YEARS TO COME.

THOSE WHO ARGUE THAT THIS PROCESS IS ABOVE POLITICS IGNORE THE REALITY OF THE SOCIETY IN WHICH MEN AND WOMEN OF THE BENCH EXIST.

WE RESPECTFULLY REQUEST THAT THIS BODY ON BEHALF OF "WE THE

PEOPLE" NOT ALLOW OUR CONSTITUTION TO BE JEOPARDIZED OR VICTIMIZED BY A WAVE OF JUDICIAL REVIEW OF ITS VERY INTENTS AND PURPOSES.

MR. CHAIRMAN, I BRING TO YOU MY COLLEAGUES - CONGRESSMAN JOHN CONYERS AND CONGRESSMAN WALTER FAUNTROY TO EXPLAIN IN DETAIL THE CONGRESSIONAL BLACK CAUCUS POSITION ON THE NOMINATION OF JUDGE BORK.

The **Chairman**. Thank you very much, Congressman. I apologize, gentlemen, for being a few minutes late. I was over on the floor. Congressman Conyers.

TESTIMONY OF JOHN CONYERS, JR.

Mr. **Conyers**. Chairman Biden and Senator Thurmond and Senator Metzenbaum, we are very pleased to be allowed to testify concerning the nomination of Judge Robert Bork to the U.S Supreme Court. This may be the most important vote for the Senate in the 100th Congress from our point of view.

As you know, for the past 22 years I have served on the House Judiciary Committee working with you over here on the Senate Judiciary Committee to improve the laws of the land, to improve race relations, not just as a legislator but as a human being who knows the pain and suffering my people have sustained on the long road toward first class and equal citizenship.

Many of you worked with us to make a reality of the proposal to honor the birthday of Dr. Martin Luther King, Jr., as a national holiday, a bill I introduced 4 days after his tragic assassination. Seventeen years later, that bill was signed into law following overwhelming congressional endorsement. I once again would like to express publicly our gratitude to those of you who helped to honor this great civil rights leader as one of our national heroes.

One of the legacies of Dr. King is the Congressional Black Caucus on whose behalf we appear today, for we are truly the product of the civil rights movement which Dr. King founded. And we are living proof of the correctness and wisdom of his nonviolent philosophy and his unshakable belief in our constitutional system. It is in the spirit of Dr. King's memory and his commitment to constitutional government that the same democratic rights for every single American that we come before you and urge the Senate to reject the nomination before you.

The Congressional Black Caucus represents not just citizens of 23 congressional districts and 12 States; we have a larger constituency. We represent the aspirations of 20 million black Americans spread throughout this country. The very fact that there are only 22 voting black Members of the House of Representatives, 5 percent of the House membership, in a country in which we constitute at least 10 percent of the population, and that only 1 black has served in the U.S. Senate since Reconstruction, reminds us of the tenuous position of the black minority and explains the importance of the federal judiciary to our well-being.

The very existence of a sizable Black Caucus in the Congress of the United States today must be credited in significant part to the decisions and leadership of the Supreme Court, which was the first major institution in our land to respond to the pleas of black Americans for justice.

At the time of its *Brown* v. *Board of Education* decision in 1954, there were only two blacks in the Congress. And so what I am saying to you today is that if Robert Bork had had his way, none of the decisions that allowed us to be in this high place to serve with you to make our country better for everybody would have been able to have occurred.

Baker v. *Carr,* the one-man, one-vote decision which has been talked about so much here; the poll tax case of *Harper* v. *Virginia State Board of Election*; the literacy test—all of these cases are cases which, had he been on the Court, if I understand what he said, we might not have had ruled in the way that has permitted a political activity to become more active and more present here in America and in the Congress. And so what this nomination means to the Black Caucus and to black America cannot be understated.

Let me just point out to you that Robert Bork's public career has spanned a period in which our society has happened to have made some significant strides in extending the promise of equal justice to all, and eliminating many of the vestiges of a polarized past. Many Americans played heroic roles in this historic forward movement toward an integrated society. Millions of others who were once skeptical of the civil rights movement have now come to terms with it and have endorsed its objectives.

During this entire period, Judge Robert Bork has, in effect, been an active and vocal legal heckler along every step of the forward march towards civil rights. And from all that appears on the public record, he remains so even today.

So on behalf of all of our other colleagues in the Black Caucus, I urge you to join with the forward wave of history, with all who are concerned with human rights progress in America, with justice and fairness, and turn back this nomination. In a way, this debate is as much about ourselves as it is about Judge Bork. Not only is he being tested, but we are as well. Hopefully, we, and not he, will point the way to our country's future.

At a time when we pride ourselves on the advances brought about by the civil rights movement, his confirmation would represent a major step backward and would polarize and divide Americans as his nomination has already started to do. To black Americans, there is no more important vote than the nomination pending now before you.

The CHAIRMAN. Thank you.

[Prepared statement of Mr. Conyers follows:]

TESTIMONY OF
CONGRESSMAN JOHN CONYERS
BEFORE THE
SENATE JUDICIARY COMMITTEE
ON THE
NOMINATION OF ROBERT H. BORK TO THE SUPREME COURT

Mr. Chairman, Members of the Judiciary Committee: Thank you for allowing me to testify on the nomination of Judge Robert H. Bork to the United States Supreme Court. This may be the most important vote for the Senate in the 100th Congress.

For the past 22 years, I have served on the House Judiciary Committee working with you on the Senate Judiciary Committee to improve the laws of the land, to improve race relations, not just as a legislator but as a human being who knows the pain and suffering my people have sustained on the long road toward first class and equal citizenship.

Many of you worked with with me to make a reality the proposal to honor the birthday of Dr. Martin Luther King Jr. as a national holiday, a bill I first introduced four days after his tragic assassination. Seventeen years later that bill was signed into law following overwhelming congressional endorsement. I would once again like to express publicly my gratitude to those of you who helped to honor this great civil rights leader as one of our national heroes.

One of the legacies of Dr. King is the Congressional Black Caucus, on whose behalf I appear today. For we are truly the product of the civil rights movement which Dr. King founded. And we are living proof of the correctness and wisdom of his non-violent philosophy and his unshakeable belief in our constitutional system.

It is in the spirit of Dr. King's memory and his commitment to constitutional government, to the same democratic rights for every single American, that we come before you and urge the Senate to reject the nomination before you. The Congressional Black Caucus represents not just the citizens of 23 congressional districts in twelve states. We have a larger constitutency; we represent the aspirations of 20 million black Americans spread throughout this country.

The very fact that there are only 22 voting black members of the House of Representatives -- constituting about 5 per cent of the House membership in a country in which black people are more than 10 per cent of the population -- and that only one black has served in the United States Senate since Reconstruction, reminds us of the tenuous position of the black minority and explains the importance of the federal judiciary to our well being.

The very existence of a sizeable Black Caucus in the Congress of the United States today must be credited, in significant part, to the decisions and leadership of the Supreme Court, which was the first major institution in our land to respond to the pleas of black Americans for justice. At the time of its landmark decision in Brown v. Board of Education in 1954, the decision which finally allowed black people to take their rightful place as part of the people of the United States, there were only two black members of Congress. It was the Supreme Court which opened up the political process:

-- Baker v. Carr, requiring one-person-one-vote and thus forbidding rural-dominated legislatures from disfranchising black urban masses;

-- Harper v. Virginia State Board of Election, invalidating the poll tax;

-- Katzenbach v. Morgan, and Oregon v. Mitchell, upholding Congressional power under the 14th Amendment to prohibit literacy tests and other devices which had a discriminatory affect on black voting;

If not for those decisions, there would be no where near 23 black members of Congress today. So, in a very real sense, the Black Caucus is the progeny of the Supreme Court. The Court opened wide the door for black participation in the nation's political life and decision-making.

But if Robert Bork had had his way, none of these decisions would have occurred and there would be no Black Caucus.

Judge Bork condemned every one of these decisions. He called Harper "wrongly decided." He denied Congress had power under the 14th Amendment to legislate a discriminatory-affects test and said the Morgan and Mitchell decisions were "pernicious constitutional law." He derided Baker v. Carr as being without constitutional basis.

If Judge Bork had been sitting on the Supreme Court at the time those cases were decided, and if his views had prevailed, it is likely I would not be here today as a senior member of the House of Representatives.

That is what this nomination means to the Black Caucus and to black America.

The franchisement of blacks has, of course, impacted on the whole country. Twenty years ago the black vote and black voters could be safely ignored. That is surely no longer the case. In 1986, the black vote was decisive in at least six United States Senate contests, elections in which the winner prevailed only because of massive support from black voters.

This is how the Supreme Court's voting rights decisions have impacted on the political process and provided black Americans with a sense of empowerment they did not previously enjoy. And it is all the result of decisions which Judge Bork denounced and ridiculed. Black America cannot risk return to the bad old days.

* *

It was the Supreme Court which first recognized, in Brown v. Board of Education, that the social compact known as the Constitution of the United States promised equal treatment under the laws to members of minority groups; and that it was the special responsibility of the judicial branch to enforce that promise even over the objections of electoral majorities. Indeed, 16 years before Brown, in the historic footnote 4 of the Carolene Products case, the Supreme Court observed that the courts had a special obligation under the Constitution to protect the rights of "discrete and insular minorities" from oppression by majoritarian institutions. At least for the 33 years since the Brown decision, the federal courts, under the guidance of the Supreme Court, have actively enforced that commitment to protect minority rights.

For black Americans and other minority groups, the enforcement of this constitutional promise is a matter of survival. In a democratic society, legislatures can be generally trusted to watch over the prerogatives of the majorities which elect them. Minorities enjoy no such assurance.

That is why protection of minority rights is uniquely the job of the judiciary. The recent balance of the United States Supreme Court, as reflected in votes dealing with minority rights, has left this principle of protection in a tenuous posture.

And that is what gives us such great concern about Judge Bork. His extensive body of writings, over a long career, both as an academic and as a judge, make clear that he does not accept the concept of a social compact in which the judicial branch is obliged to protect minorities from the tyranny of the majority. He is a strict majoritarian -- at least where minority rights are concerned. And we are not reassured by anything different he said before this Committee at his job interview.

Judge Bork's view of the social compact is at direct odds with those of most of the Justices who have sat on the Supreme Court for at least the past 50 years. Over and over, starting with his now famous exegesis of "Neutral Principles" in the Indiana Law Journal, Judge Bork has insisted that the only individual rights protected against the majority are those explicitly and unmistakably mentioned in the Constitution and Bill of Rights. That, in itself, is a chilling idea for those of us whose ancestors were enslaved at the time of the adoption of the original compact and whose assimilation into the polity of the United States under the Constitution required a bloody war and another hundred years of equivocation.

Equally disturbing is his apparent willingness to permit majorities to maintain exclusivity through the use of devices which restrict the right to vote. I refer again to his public criticism of legislation forbidding certain voter literacy tests which had been used as a pretext for discrimination and his denunciation of the Supreme Court decision forbidding poll taxes.

Whatever his real motivation, it is indisputable that Judge Bork opposed virtually every civil rights advance of this era.

In 1948, six years before Brown v. Board of Education, the Supreme Court decided the landmark case of Shelley v. Kraemer. A precursor of Brown, the case outlawed judicial enforcement of racially restrictive deed covenants. Bork's Indiana Law Journal article denounced the Shelley opinion, thus supporting the right of property owners to divide the country into racial ghettoes enforced by the police power. In the 40 years since Shelley, housing integration has advanced at a snail's pace. If Bork had had his way, it would have stood absolutely still.

When Congress, inspired by Supreme Court decisions like Shelley and Brown, as well as the early civil rights movement, passed the Civil Rights Act of 1964 prohibiting discrimination in public accommodations, Bork called it "unsurpassed ugliness." There is no record that he ever found racial segregation and discrimination itself so personally obnoxious or offensive.

And for the next 20 years, Mr. Bork took every opportunity to inveigh against proposals to expand rights of racial equality and justice in our land, including his opposition to protection of the right to vote discussed earlier:

-- As Solicitor General, Bork opposed fair housing remedies for low income black citizens even though the federal government had participated in the discrimination. (Hills v. Gautreaux, 425 U.S. 284, 1976).

-- He found fault with the Supreme Court's decision in Reitman v. Mulkey (387 U.S. 369, 1967), which upheld the California Supreme Court decision invalidating the state's Proposition 14, a ballot measure that overturned California's open housing law.

-- In 1972, Bork was one of only two law professors to testify in support of the constitutionality of proposed legislation to drastically curtail school desegregation remedies that the Supreme Court had held necessary to cure violations of the 14th Amendment. And as Solicitor General, he continued to oppose school desgregation remedies before the Supreme Court.

-- Regarding affirmative action in medical school admissions, Bork sharply attacked the opinion of Justice Lewis Powell, the man he is nominated to succeed, in University of California Regents v. Bakke (438 U.S. 265, 1978), for suggesting that universities might take affirmative steps to train qualified blacks as doctors to meet the needs of the medically underrepresented black community. Justice Powell has cited that opinion as the one of which he is most proud.

Judge Bork has gone so far as to say that affirmative action offends "ideas of common justice." I have not seen in his writings a suggestion that he feels racial discrimination "offends common justice."

CONCLUSION

Judge Bork's public career has spanned the period in which our society has made its greatest strides in extending the promise of equal justice to all its citizens and eliminating many of the vestiges of a polarized past. Many Americans played heroic roles in this historic forward movement toward an integrated society. Millions of others who were once skeptical of the civil rights movement have now come to terms with it and endorsed its objectives. During this entire period, Robert Bork has been in effect an active and vocal heckler along every step of the forward march toward civil rights. And, from all that appears on the public record, he remains so to this day.

So, I, on behalf of my colleagues in the Black Caucus, urge that you join with the forward wave of history, with all who are concerned with human rights progress in America, with justice and fairness, and turn back this nomination.

In a way, this debate is as much about ourselves as it is about Judge Bork. Not only is he being tested, but we are as well. Hopefully, we, not he, will point the way to our country's future. At a time when we pride ourselves on the advances brought about by the civil rights movement, his confirmation would represent a major step backward and would polarize and divide Americans as his nomination has already started to do.

To black Americans there is no more important vote than that of the nomination pending before you now. Thank you.

The **Chairman**. Mr. Fauntroy.

TESTIMONY OF WALTER E. FAUNTROY

Mr. **Fauntroy**. Thank you so very much, Mr. Chairman, Senator Metzenbaum, and Senator Thurmond.

It is my happy opportunity to appear before you as the lone congressional representative of 700,000 disenfranchised residents of the District of Columbia who continue in this 200th year of the celebration of the Constitution to endure the tyranny of taxation without representation.

I appear also in my capacity as president of the Congressional Black Caucus national network vehicle, the National Black Leadership Roundtable composed of the heads of some 300 national black organizations who are working collectively on a number of projects for the economic, political and social empowerment of our people. I am also here as chairman of the board of directors of the Southern Christian Leadership Conference founded by Dr. Martin Luther King, Jr., and the organization and men with whom I worked for so many years as an organizer in the civil rights movement.

I appear here with my colleagues in the Congressional Black Caucus for the express purpose of unalterably opposing the confirmation of Judge Robert Bork to the Supreme Court of the United States. You know we opposed his confirmation because Bork is a man whose record clearly suggests that he would place in jeopardy the hard-won civil rights, civil liberties and social gains that have been made over the last half century.

Accompanying me for this testimony is Attorney Leslie Baskerville, who is executive director of our roundtable.

The African-American position, gentlemen, on Mr. Bork, which we confidently represent here today, is one at which we have arrived after careful consideration of the Bork record in terms of three things: how it would have affected our past; how it is affecting our present struggle; and what it bodes for our future if he is, in fact, confirmed.

Let us take a look at the past. When we open the floodgates of our collective memory and travel back over the years of our sometimes up and sometimes down struggle to be full citizens of this country, we recognize that his 20th century record on voting rights, equal housing opportunity, equal education and employment opportunities, and equal access to public accommodations suggests to us that were he on the High Court in the 19th century, he would have supported the *Dred Scott* decision, holding that black people had no rights that whites were bound to respect. He would have opposed the gains that we made during the Reconstruction when blacks were elected to the Congress and other legislative bodies, and he would have supported the Hayes-Tilden compromise and all of the post-Reconstruction disenfranchisement activity for the next 4 years that stymied equal access, equal opportunity and full citizenship for African-Americans.

Had Bork been on the High Court in the first half of the 20th century, a period that Justice Douglas limited as a "spectacle of slavery unwilling to die," we believe he would have voted to block full citizenship rights for our people; he would have voted to deprive blacks of the right to own and convey property. Had he been on the Court in 1917 with the *Buchanan* v. *Walley* case or with the *Shelley* v. *Kraemer* case, we believe that he would have interpreted the Constitution to prohibit the integration of dining cars, restaurants, buses, beaches and parks and voted against *McCabe, Atcheson, Topeka and Santa Fe Railroad* in 1914 or *Lombard* v. *Louisiana* in 1963.

Had Bork been on the High Court when key questions on the voting rights of African-Americans were decided, he would have voted to deny us the franchise, as he stated his position on the *Katzenbach* v. *Morgan* back in 1966.

Had Bork been on the High Court, he would have opposed equal access to public accommodations as provided by the Civil Rights Act of 1964, calling these provisions, as he has, ones of "unsurpassed ugliness."

As the Reverend Gardner C. Taylor said at our Congressional Black Caucus prayer breakfast this past weekend, we are hearing in these proceedings from three Borks: the Bork that was, the Bork that claims now to be today, and the Bork that nobody knows, one who would sit on the Supreme Court, were you to be so unwise as to confirm him. In the field of education and employment, had Bork been on the High Court, he would have voted against providing equal educational opportunity for blacks, as a number of cases which are listed here will suggest.

In short, Mr. Chairman, black Americans are fortunate that Mr. Bork was not on the High Court at the time when these landmark decisions were made; for with this body of law, beginning in the early 1940's, escalating in the 1950's and reaching national prominence in the 1960's, a great movement to end the hypocrisy of this separate and unequal society emerged in the United States. The culmination of this movement was the passage of the civil rights legislation, executive orders and court decisions that have been a source of support for all of us.

We all know that, despite gains made by blacks in recent decades, blacks are still second class citizens in many respects. In 1987, the average per capita income of households headed by whites was $39,000; for a comparable black community residence, $33,000.

Today, Mr. Chairman, the progress of the past 15 years, and certainly of the past 35, is undergoing an assault. Already existing disparities between black and white Americans in income, education, health, joblessness, economic well-being have been aggravated by the Reagan administration's fiscal and civil right policies. Both civil rights and civil liberties have been bitterly attacked in recent years. Efforts to dismantle the civil rights gains of the past two decades have acquired a new vengeance in the Reagan administration, turning its back upon the bipartisan support for civil rights laws and policies that have been shaped in the last 20 to 25 years.

For example, the administration sought to weaken the Voting Rights Act extension, to kill Legal Services Corporation activity, to provide tax exemptions to schools which discriminate, and scuttle the Freedom of Information Act, to reduce the federal court authority to hear these cases involving certain controversial social and constitutional issues, as cases in point. In the judicial sphere, there are a number of assaults that I have listed here, which I will not now mention.

The High Court, as you know, did deal one severe blow to civil rights enforcement in 1984 with the *Grove City* case. In that decision, the Court held that title IX of the 1972 Education Act amendments barred sex discrimination only in the specific program of activity. And we are all familiar with that.

A review of the Bork record suggests that were he on the High Court at the time of many of these landmark cases deciding the rights of African-Americans, he would have denied us what we have already gained and what we must now protect.

The constitutional world view of Bork suggests the clear and present danger his confirmation poses to African-Americans, and that is why we are unalterably opposed to his confirmation. To confirm to a 20th and possibly a 21st century Supreme Court one who opposed minority rights and those legal remedies designed to tear down the remaining barriers to full citizen participation, should not be confirmed.

Let me return to Dr. Gardner Taylor's thesis that you are examining three Robert Borks here this week: the Bork that was, the Bork that he now claims to be, and the Bork that nobody knows, the one who would sit on the Supreme Court should you confirm him. We are confident that we know the Bork that would be. We believe that the past is prologue. We urge you not to be swayed by his display of erudite obfuscation during his 30 hours of testimony, for his record, which spans the same period in which many of our most significant strides were made toward becoming a more open and inclusive society, shows that Bork opposed those strides. The testimony he has given I think speaks eloquently to that fact.

So we urge you strongly to vote no, to vote no for the bright future of open and inclusive society in our country. Vote no, Senators Heflin and Shelby, for Mayors Richard Arrington and the Joe Reeds and the John Nettles of Alabama. Vote no, Senators Specter and Heinz, for the Reverend Leon Sullivans, the Mayor Wilson Goodes, the C. Dolores Tuckers, the Representative David Richardsons and the Attorney William Colemans of Pennsylvania.

We plead with you vote no, Senators Nunn and Fowler, for the Coretta Scott Kings, the Andrew Youngs, the Joe Lowerys, the Jesse Hills of Georgia. We urge you to vote no, Senators Johnston and Breaux, for the Mayor Bartholomews, the Faye Williamses, the Dr. Norman Frances, and the Joe Delfitts of Louisiana.

We urge you to vote no, Senators Sasser and Gore, for the Alex Haleys, the Lois DuBarries, the John Fords, and the Rufus Joneses of Tennessee. We urge you in Mississippi, Senators Stennis and Cochran, to vote no for the Mike Espes and the Bennie Thompsons and the Henry Kirkses and the Fannie Lou Hamers of Mississippi and across this nation.

Vote no to the risk of reopening race relations battles which have been fought and put to rest. Vote no to big business and big government, and vote for individuals and consumers. Vote no to intrusions on the right to privacy in our homes and on our jobs. Vote for justice, vote for freedom, vote for equality of all men and women. Vote not to confirm Robert Bork to the Supreme Court of the United States.

The CHAIRMAN. Thank you very much, Congressman.

[Prepared statement of Mr. Fauntroy follows:]

TESTIMONY OF
THE HONORABLE WALTER E. FAUNTROY (D-D.C.) and PRESIDENT OF THE NATIONAL BLACK LEADERSHIP ROUNDTABLE
BEFORE THE
SENATE JUDICIARY COMMITTEE
ON
THE NOMINATION OF JUDGE ROBERT BORK TO THE UNITED STATES SUPREME COURT

Tuesday, September 29, 1987

Mr. Chairman and members of this Committee, I thank you for this opportunity to appear before you this morning as the lone congressional representative of the 700,000 disenfranchised residents of the District of Columbia, who continue to endure the tyranny of taxation without representation. I appear also in my capacity as President of the National Black Leadership Roundtable, a coalition of the heads of more than three hundred (300) national Black organizations who are working collectively on a number of projects for the economic, political and social advancement of African Americans, and as Chairman of the Board of Directors of the Southern Christian Leadership Conference and long-time activist in this country's organized civil rights movement. I appear to express our unalterable opposition to the confirmation of Judge Robert Bork to the Supreme Court of the United States. We oppose his confirmation because Bork is a man whose record clearly suggests that he would place in jeopardy the hard won civil rights, civil liberties and social gains that have been made over the last half century. Accompanying me as we make this argument is Attorney Lezli Baskerville, Executive Director of the Roundtable.

THE AFRICAN AMERICAN PERSPECTIVE ON BORK

The African American position on Robert Bork which my colleagues and I confidently represent today is one at which we have arrived after careful examination of the Bork record in terms of how it would have affected our past, how it is affecting our present struggle and what it bodes for our future.

OUR PAST STRUGGLE AND THE BORK RECORD

In this year of the bicentennial celebration of the U. S. Constitution, much attention has been paid to the strengths and weaknesses of our Constitution. For African ancestored people, the most glaring weakness is that the document legally sanctioned the pernicious system of American slavery by reducing their legal status to chattel--three fifths of a human being. Its strength is that several amendments later, albeit enacted because of the relentless struggles of those who were not included in the Framers' visions of "We The People" and their allies, African ancestored people became one of "the people" The history of Africans in America during the first 200 years under our Constitution has been one of first attempting to be recognized as legal beings; then seeking inclusion among those whose rights and privileges were protected under the Constitution; and then attempting to obtain for these newly recognized beings, "simple justice." At each point in that struggle, the Bork record suggests that he would have weighed in against our quest for full citizenship rights.

His 20th Century record on voting rights, equal housing opportunity, equal educational and employment opportunities, and equal access to public accommodations suggests to us that, were he on the High Court in the 19th Century, he would have supported the Dred Scott Decision (1857) holding that African ancestored people had no rights that whites were bound to respect; he would have opposed the gains we made during the Reconstruction when Blacks were elected to the Congress and other legislative bodies; and he would have supported the Hayes-Tilden Compromise and all of the post-reconstruction disenfranchisement activity which for the next forty years stymied equality of opportunity and full ciltizenship participation by African Americans.

Had Robert Bork been on the High Court in the first half of the twentieth century, a period which Justice Douglas lamented as "a spectacle of slavery unwilling to die" - Jones v. Mayer 393 U.S. 409 (1968), we believe he would have voted to block full citizenship rights for our people. He would have voted to deprive blacks of the right to own and convey property had he been on the court in 1917 when Buchanan v. Wanley, 245 U.S. 60 was decided, or in 1927 when Shelley v. Kraemer 334 U.S. 1 (1948) was decided. His archaic views on segregated neighborhoods were evidenced when, as Solicitor General of the United States, he unsuccessfully opposed fair housing remedies for low income black citizens who had been the victims of Government discrimination. Hills v. Gautreaux 425 U.S. 284 (1976).

We believe he would have interpreted the Constitution to prohibit the integration of dining cars, restaurants, buses, beaches and parks and voted against McCabe v Atchinson, Tokeka and Santa Fe Railroad U.S. 15 (1914). (Dining Cars); Lombard v. Louisiana 373 U.S. 267 (1963) (Restaurants); Gayle v. Browder, 352 U.S. 903 (1956) (Buses); Mayor of Baltimore v. Dawdon, 350 U.S. 877 (1955) (Beaches); and New Orleans Park Improvement Association v. Detiege 358 U.S. 54 (1958) (Park).

Had Bork been on the High Court when key questions on the voting rights of African Americans were decided, he would have voted to deny us the franchise as his stated positons on Katzenbach v. Morgan, 348 U.S. 641 (1966) and Oregon v. Mitchell, 400 U. S. 112 reveals. He has called those decisions upholding a national ban on literacy tests "very bad, indeed, pernicious Constitutional law." See, Hearings on Human life Bill before the Subcommittee on Separation of powers of the Senate Judiciary Committee, 97th Congress, 1st Session, (1982). He would have opposed the outlawing of the State Poll tax as in the case of Harper v. Virginia Board of Education, 383 U.S. 663 (1966) which he characterized as "wrongly decided". See, Senate Judiciary Hearings on Confirmation of Robert Bork as Solicitor General, p. 17 (1973) he would have opposed the one-person-one vote principle as expressed in the landmark civil rights cases of Baker v. Carr 369 U.S. 86 (1962); and Reynolds v. Sims, 377 U.S. 533 (1964) stating as he has that there is no basis for these dicisions under the Fourteenth Amendment. 47 indiana Law Journal 1, 18-19 (1971).

Had Robert Bork been on the High Court, he wuold have opposed equal access to public accommodations as provided in the Civil Rights Act of 1964, calling these provisions "unsurpassed ugliness." (Bork, Civil Rights--A Challenge, The New Republic, 1963). I am aware, Mr. Chairman, that the years later at confirmation hearings in 1973 he conveniently repudiated this position as he has done others in these confirmation hearings. As the Reverend Dr. Gardner C. Taylor said at the Congressional Black Caucus Prayer Breakfast last week, "we are hearing from three Robert Borks in the proceedings: The Robert Bork of the past; the Robert Bork he claims to be today; and the Robert Bork nobody knows, the one who would sit on the Supreme Court were you to be so unwise as to confirm him.

In the fields of education and employment, had Robert Bork been on the High Court, he would have voted against providing equal educational and employment opportunities for blacks. For he would have opposed Steele v. Louisville and Nashville Railroad Company, 323 U.S. 192 (1944); Brown v. Board of Education 347 U.S. 483 (1954);Bolling v. Sharpe, 347 U.S. 497 (1954), or so his actions would suggest when, as Solicitor General, he attempted to aid the city of Boston in its move to circumvent school desegregation efforts.

Bork sought to have the government file a brief in support of Boston, but was overruled by Attorney General Levi. See, Orfield, Must We Bus? pp 352-353 Brookings Institution 1987; Washington Post, May 30, 1976. Bork also testified in support of the constitutionality of legislation drastically limiting school desegregation remedies that the Supreme Court has held constitutionally necessary to redress violations of the 14th Amendment. Hearings of the Subcommittee on Education of the Senate Committee on Labor and Public Welfare on the Equal Education Opportunity Act of 1972. 92nd Congres, 2nd Session (1972). .His characterization of Bakke as "resting upon no constitutional footing of its own" would further support this conclusion. (The Unpersuasive Bakke Decision" The Wall Street Journal. July 21, 1978.

In short, Mr. Chairman, Black Americans are fortunate that Mr. Bork was not on the High Court at the time these landmark decisions were made. For with this body of law, beginning in the 1940's, escalating in the 1950s, and reaching national prominence in the 1960's, a great movement to end the hyprocracy of this separate and unequal society emerged in the United States. The culmination of this movement was the passage of key civil rights legislation, executive orders and court decisions while enforcement of the new laws was at all times inadequate, slow but steady progress began to be made. In the decade of the 1960s, and continuing, although slowing in the 1970s, progress was made in voting rights enforcement, educational attainment, lowering the poverty rate, and improving Black employment. More Black youths attended college and the managerial/professional occupations seemed to be opening for Blacks.

Despite gains made by Blacks in recent decades, however, Blacks are still second-class citizens in many respects. In 1987 the average per capita income of households headed by whites is $39,135. For comparable Black households, it is about $3,397 (down from $4,500 in 1981). The unemployment rate of Blacks has remained more than twice that of whites in the post World War II era. A similar pattern has prevailed in education--less than 9 percent of black Americans finished four years of college compared to over 18% of white Americans. In the early 1980s, Blacks served as mayors of some of our largest cities and they were also well represented in county governments and state legislatures in those areas of both the North and the South where the Black population was concentrated. However, there were no Black state governors, and when Edward Brooke of Massachusetts lost his Senate seat in 1978, this, the nation's most prestigious legislative body was left without a single Black member.

OUR PRESENT STRUGGLE AND BORK

Today, Mr. Chairman, the progress of the past 35 years has not only stalled, but strident efforts are being directed toward reversing the small advances made and returning to the old days of Black subordination under the unvarnished rule of white men. Already existing disparities between Black and white Americans in income, education, health, joblessness and economic well-being have been aggravated by the Reagan Administration's fiscal and civil rights policies. Both civil rights and civil liberties have been bitterly attacked.

Efforts to dismantle the civil rights gains of the last two decades have acquired a new vengeance in the Reagan Administration. Turning its back upon the bi-partisan support for civil rights laws and policies that have characterized our nation's most recent history, the Administration has systematically crippled federal enforcement. This has occured through abuse of the federal regulatory progress; promotion of bankrupt and contrary legal and litigation positions; non-enforcement of the laws; and support of legislation to reverse major, time-honored and court-supported civil rights remedies.

For example, the Administration sought to weaken the Voting Rights Act extension, kill the Legal Service Corporation, provide tax exemptions to schools which discriminate, scuttle the Freedom of Information Act, reduce the federal court authority to hear cases involving certain controversial social and constitutional issues (e.g., school desegregation), limit the Supreme Court's function as final arbitor of the nation's laws in cases involving certain controversial social and constitutional issues, and secure enactment of retrogressive immigration reforms. But the Administration made little headway in the legislative branch. It was rebuffed by both Democrats and Republicans alike.

In the judicial sphere, the Administration was likewise stymied in its effort to get support for its skewed interpretation of federal civil rights laws. Despite six years of relentless Administration efforts to obtain judicial sanction for its antebellum civil rights posture, the Supreme court, by and large, remained vigilant in its protection of the rights of Blacks and other minorities covered by our civil rights laws. Thrice in 6 years, for example, the High Court upheld against scathing Administration assault, the use of race-conscience goals and timetables to remedy the effects of racial discrimination. The court upheld such goals in the recruitment, selection (Sheet Metal Workers v. EEOC) and promotion (U.S. v. Paradise) of protected persons.

The high court did, however, deal one severe blow to civil rights enforcement in its 1984 Grove City case. In that decision, the Court held that Title IX of the 1972 Education Act Amendments barred sex discrimination only in the specific "program or activity" for which the federal funds were intended, not the entire education institution. This misinterpretation of the law has been used to narrow the scope of coverage of three other anti-discrimination laws which contain the same "program or activity" language: Title VI of the 1964 Civil Rights Act, which bars discrimination based on race, color or national origin in all federally assisted programs or activities; Section 504 of the Rehabilitation Act of 1973, which prohibits bias against the handicapped in programs or activities receiving federal aid; and the "Age Discrimination 'Act of 1975, which bars discrimination based on age in programs activities receiving federal aid.

A review of the Bork record suggests that were he on the High Court at the time the landmark cases deciding the rights of African Americans to fully and freely participate in the electoral process were decided; or when the cases were decided regarding their access to open and decent housing in neighborhoods of their choosing; in equal educational and employment opportunities; equal access to public accommodations--and cases that generally rid this society of the remaining legal vestiges of slavery--the "depth and incidence" of inequality which existed in the first 50 years of Twentieth Century America, would today still exist. Moreover, his opinions indicate that if confirmed to the Supreme Court, the judicial unraveling process that we note with the Grove City"UX decision and its aftermath, will undoubtedly continue and hasten. Gentlemen, this is something we dare not risk.

This constitutional worldview of Bork suggests the clear and present danger his confirmation poses to African Americans, and to the continued advancement our great society is making toward becoming a more just and open society. To confirm to a twentieth and possibly twenty-first Century Supreme Court one who opposes the protection of minority rights, and those legal remedies designed to tear down the remaining barriers to full participation in our society by all groups, I believe, would send a dangerous signal to those who have just begun to be integrated into the American social fabric, and who attribute their slow, but steady progress, in large measure to the careful and calculated exercise of the full panoply of legal remedies available to them. To add to our High Court a threat to the voting rights, housing rights, employment and education rights, and equal access rights of minorities, in this general climate of growing polarization, as evidenced by Howard Beach, the Citidel incident, Forsythe County the resurgence of racially motivated violence on a number of our college campuses, augurs for social unrest and racial antagonism.

OUR FUTURE AND BORK

I return now to Dr.Gardner Taylor's thesis that you are examining three Robert Borks at these hearings: The Bork that was; the Bork that he claims now to be; and the Bork nobody knows, the one who would sit on the Supreme Court should you confirm him. We are confident that we know the Bork that would be. We believe that the "past is Prologue." We urge you not to be swayed by his display of erudite obfuscation during his 30 hours of testimony. For, his record, which spans the same period in which many of our most significant strides were made toward becoming a more open and inclusive society, shows that Bork opposed those strides. The testimony he gave before you was, in many regards materially different from his writings and actions. We are all familiar with "confirmation conversions" and Bork seems to undergo a bit of a metamorphosis each time he comes before us for confirmation. We urge you to look beyond the ruse and the rhetoric at the documented Bork record, and if you believe, as do the people I represent, that we must not jeopardize the progress this country has made with respect to providing equal opportunity for all its citizens, then you must vote no on Bork. Vote no for the bright future of open and inclusive society. Vote no, Senators Heflin and Shelby, for the Mayor Richard Arringtons, Joe Reeds and Rev. John Nettles in Alabama. Vote no, Senators Specter and Heinz, for the Reverend Leon Sullivans, the Mayor Wilson Goodes, the C. Delores Tuckers, the Representative David Richardsons on the Attorney William Colemans of Pennsylvania.

Vote no, Senators Nunn and Fowler, for the Coretta Scott Kings, the Mayor Andrew Youngs, the Reverend Joseph Lowerys and the Jesse Hills of Georgia. Vote no, Senators Johnston and Breaux for the Mayor Bartholomy's , the Faye Williams, the Dr. Norman Frances and the Joe Delpits of Louisiana.

Vote no, Senators Sasser and Gore for the Alex Haleys, the Lois Deberrys, the John Fords and the Rufus Jones of Tennessee.

Vote no, Senators Stennis and Cochran, for the Mike Espys and the Benny Thompsons, the Henry Kirkseys and the Fanny Lou Hammers of Mississippi.

Vote no to the risk of re-opening race relations battles which have been fought and put to rest.

Vote no to big business and big government. Vote for individuals and the consumer.

Vote no to intrusions on the right to privacy in our homes and on our jobs.

Vote for justice, vote for freedom, vote for the equality of all men and women.

Vote not to confirm Robert Bork to the Supreme Court of the United States.

The **Chairman**. Senator Thurmond.

Senator **Thurmond**. I would like to ask you all some questions, but I cannot think of any question I could ask in which you would give a favorable answer. [Laughter.]

At any rate, we are glad to have you here, all three of you distinguished Congressmen.

Mr. **Dymally**. Good to be with you. The Senator would be pleased to know that he and I share the same platform against the excise tax and tobacco in North Carolina.

Senator **Thurmond**. South Carolina. I am from South Carolina.

Mr. **Dymally**. South Carolina.

Senator **Metzenbaum**. I appreciate all three of you coming over. I appreciate the fact the Congressional Black Caucus has taken a position with respect to this matter, and I think the impact of your leadership in this country is being felt in this instance as it has been in so many other instances in recent years, and I am just grateful to you for being with us today.

The **Chairman**. Gentlemen, I have one question. How do you respond to the assertion that although Judge Bork may have—with the single exception of the *Brown* case—may have been wrong on every civil rights issue of the past 28 years, at the time that it was before—at the time it was current. But notwithstanding that, he has, as a circuit court judge, not let those feelings, or statements from the past impact upon his decisionmaking process, and that he is now convinced that those gains were legitimate, should have been made, and has recanted—to use his phrase—many of those views.

And we were told by Elliot Richardson a few moments ago, that we should not look at what he was, and said, but what he is saying now.

How do you respond to that?

Mr. **Conyers**. Well, Senator Biden, the fact of the matter is that in a circuit court circumstance, you only get a fraction of those kinds of cases. There are very, very few of the kinds of landmark cases that he has commented on so frequently across his legal and professional career, that actually have come before the court of appeals.

It is a very limited circumstance. Also, of course, as his confirmation showed before, we were not looking at a Supreme Court Justice. There was someone to correct any views that he may have had, but now, going to the highest Court, that just will not be there for us to consider.

So I really feel that these statements, and these writings, which I think by every standard of lawyers were pretty extreme, have to be held as expressions of his that should be binding upon him.

This has been a 5-day job interview for Judge Bork here, and I can understand that he would want to back off from them.

But I close with this observation: if we only had his written and spoken word to judge him, it would not even be necessary for the Congressional Black Caucus to come over here. There would not be a leg for him to stand on in the U.S. Senate.

The **Chairman**. Senator Kennedy.

Mr. **Dymally**. Mr. Chairman, if I may respond to your question.

The **Chairman**. Oh, yes. Congressman Dymally.

Mr. DYMALLY. I was somewhat troubled by Mr. Richardson's statement this morning considering his past record on the question of civil rights, a man of great integrity and deep commitment to the cause of equality. To suggest that whatever one said in the past is purely academic and was a matter of philosophical rambling in the classroom and ought not to be taken seriously, I think is very troubling.

How else are we to judge anyone, other than by his statements? How do we know that he is really sincere in his professed change?

The CHAIRMAN. Thank you.

Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

I regret that I was not here when you made your formal presentation, I look forward to reviewing it. I want to extend a warm word of welcome to our panelists. I hope their positions will be well considered by the members of this panel as well as the Members of the Senate.

In the 25 years that I have been in the Senate, I have had the opportunity to work with these individuals, and others that they are representing, as we tried to remove the different barriers which have denied liberty to many of the citizens of our country.

We have been dealing with the issues of privacy, equal protection, the first amendment, the relationship between the presidency and the Congress, and other questions during the course of these hearings.

And we have spent some time—and it has been important time—considering what this country would look like, if the positions that Judge Bork had taken were the positions that had been accepted by the Supreme Court. A very different America.

And I know that Judge Bork has recanted some of the positions. I know you can probably remember 1963. In August of that year—I still remember it as yesterday—when Martin Luther King spoke at the Lincoln Memorial, a stirring address, and, at the very time Judge Bork was writing that the Congress did not have the power to deal with knocking down discrimination in public accommodation and transportation, and hotels. He did not believe the court could strike down the poll tax. He criticized the opinion requiring one man, one vote.

And on employment, the elimination of discrimination in employment, he did not think the Congress had the power to deal with that.

And this would have been a very different America, I imagine. In the recent years, we have seen an attempt by an administration, in the *Bob Jones* case, to try and provide the tax credit for a nonsegregated school.

I think what you are telling us here is that this battle for equal rights and liberties, which this panel and others have been so much a part of, is still being fought. In spite of the statements that have been made by Judge Bork here, I have been impressed by the fact that when he went on public record it was always to criticize.

We are hard pressed to find public statements or speeches that he made in support of the cause of civil rights, and for striking down the barriers of discrimination.

I have not seen those. They have not been made a part of the record. And one could say, well, look, we could differ on this issue, on this legalism, or on this issue, every one of those—poll tax, literacy tests, one man, one vote, public accommodations.

In each one of these tests you could find a legal technicality, why they ought not to be struck down, and no really profound statements, comments, a speech, or law review articles about the need to really come to grips with these issues. And I find that of concern.

Let me just ask you, just finally: would the world of America, if it was the world of Judge Bork, with the holdings that he had on poll tax, one-man, one-vote, the others—what would that look like to any of you on this panel?

Maybe each of you could just give a brief comment, and then we will move on, but I would appreciate it.

Mr. **Fauntroy**. Thank you, Senator Kennedy.

The burden of my testimony was to the effect that I am confident that the 300 heads of national black organizations, that are a part of our national network, are unalterably opposed to the Bork nomination, or confirmation, for the reason that looking back over the past, we feel that he would have opposed—from his stated positions—all the gains that we have made in the past 25 years.

And that second, in the recent past, his performance on the circuit court over the past 5 years has been one in which he has voted in 48 of 50 split decisions, to deny access to the courts for individuals who were seeking redress, as we had to seek through the courts in our day.

There is one thing that I, and Martin Luther King, Jr., and Andy Young hold in common, and that is that we are ministers, and as ministers, we are not unaccustomed to 11th hour conversions, and to confirmation conversions.

And just as I say from Sunday to Sunday at our church, when you join the church, please do not apply to be the pastor as soon as you have confessed the error of your ways.

And quite frankly, those of us who lived through the difficult period of making those changes do not want to go back. We do not want any more encouragement for the kinds of things we have seen in Howard Beach and Forsyth County, and elsewhere in this country, and I think that is why, the American people, looking at the Bork record, and assessing the recantations, and fearing what the unknown Bork, the one free of necessity of coming before a forum like this, and being confirmed, would be, are opposed to his nomination as the black leaders of this country.

Mr. **Conyers**. Senator Kennedy, I just wonder sometimes: can't we consider compassion as one of the qualities that we would want in an Associate Justice to the Supreme Court? Of course we want intellect, we want dedication, we want integrity.

But the one thing that struck me about these hearings, and I should congratulate you on them, gentlemen, because America has had a history lesson of great, great importance.

And the one thing that I have seen to be missing is the element of compassion in this man. Of course he has analyzed and theorized, and rethought. He has left so much wiggle room in his recantations, that we have lawyers now going over the proceedings to try to find out just what he did claim that he is not going to do again.

But that element of compassion, to me, was very starkly missing in the course of his testimony before you.

Mr. DYMALLY. Mr. Chairman, the one and only time I met with Judge Earl Warren was at the Martin Luther King Hall at the University of California School of Law in Davis, and he said to me he thought his most important decision was one man, one vote.

And I asked him why. He said because it gave black power to acquire more power, and I believe that if Judge Bork were on the Court then, he would not have done so.

If I may, Mr. Chairman, I just want to read two lines here of the other members joining the Black Caucus in opposition to Mr. Bork.

"Joining the Congressional Black Caucus are the World Conference of Black Mayors; the National Black Caucus of Local Elected Officials; the Democratic National Committee, Black Caucus; the National Black Caucus of State Legislators; the National Conference of Black Mayors; the National Bar Association; the National Bar Association Judicial Council; The National Caucus of Black School Board Members; and the National Association of Black County Officials."

Senator KENNEDY. Thank you.

The CHAIRMAN. Gentlemen, thank you very, very much. I know you are busier than we, and for you to come over to this side, I appreciate it very much, and the entire committee appreciates it.

Mr. DYMALLY. Thank you very much, indeed.

Mr. CONYERS. Thank you very much.

Mr. FAUNTROY. Thank you very much.

The CHAIRMAN. Thank you.

Now we have had a bit of a scheduling change here to accommodate our colleagues, which we always try to do, House or Senate.

We have gone from a pro-Bork witness to an anti-Bork panel. We will now go to a pro-Bork panel, somewhat out of order, and that is the law school deans panel. If they are here—they are not here. Is there any pro panel that is here?

How about the pro-antitrust panel?

Mr. BOLTON. They are not all here yet. The deans, I believe, are all here.

The CHAIRMAN. Yes. Why don't we recess for 5 minutes.

Mr. BOLTON. If they are listening, come on over.

Senator METZENBAUM. Mr. Chairman, before you do that, may I just be heard?

The CHAIRMAN. Yes.

Senator METZENBAUM. I had heard the special orders on the floor, and it is my understanding that special orders on the floor, that at 4 o'clock two amendments are coming up, one of which Senator Kennedy is handling, one of which I am handling.

I am very anxious to hear both Mr. Frampton and Mr. Ruth, so although I understand the Chair's desire to have this balance back and forth, I do not think it is that necessary, and I wonder if we could not hear Mr. Frampton and Mr. Ruth. I think their testimony is very, very significant in this entire hearing, and I would like to be present to hear it.

Senator **Kennedy**. At least I would be glad to enter into a consent agreement in terms of time, if it was agreeable to the ranking minority member, that we would end that panel in half an hour, so that we would have an opportunity to question both of those.

We had set the time for the two amendments. The chairmen of the committee, Senator Nunn and Senator Warner, did so to accommodate us. We had thought that we would be through with that witness by 4 o'clock. I would as well like to hear the antitrust ones, but they had scheduled that, and——

The **Chairman**. All right. Well, let's bring up Mr. Ruth and Mr. Frampton, and we will—it is amazing how quickly staff can move those nameplates. We will make this as concise as possible, please.

Would you stand and be sworn, gentlemen.

Do you swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Ruth**. I do.

Mr. **Frampton**. I do.

The **Chairman**. Our panel is made up, first, of Henry Ruth. Mr. Ruth was Deputy Watergate Special Prosecutor. He is currently counsel to UNISYS. I hope I pronounce that correctly. And second, Mr. George Frampton. Mr. Frampton is a former Assistant Watergate Special Prosecutor and is currently president of the Wilderness Society.

Gentlemen, welcome, please proceed with your statements, and your entire statements will be placed in the record as if read, and we would appreciate a summarization, as best as you can make it.

TESTIMONY OF A PANEL CONSISTING OF HENRY RUTH AND GEORGE FRAMPTON

Mr. RUTH. Mr. Chairman, thank you. I have no prepared statement, but I thought that I would take a few minutes to describe what happened in the Saturday night massacre.

I was the senior man on the Watergate Special Prosecution Force that evening.

The Watergate special prosecution force had been created in May 1973 by a charter between the Attorney General and the Special Prosecutor. The charter had the force and effect of law and it was published in the Code of Federal Regulations. With a certain then-unknown irony, it was posted in that section of the regulations following the Office of the Pardon Attorney.

The charter had the force and effect of law, and in *U.S.* v. *Nixon*, the Supreme Court so held. We started our work, and it soon became clear, when the existence of presidential tapes became known, that the tapes were the key to tell whether or not John Dean was a liar, or President Nixon was lying.

On October 19, 1973, John Dean, the President's counsel, pleaded guilty to obstruction of justice. The obstruction of justice included conversations with the President of the United States. Those conversations were on the nine tapes that were the subject of the subpoena that had been upheld by the U.S. district court, and the U.S. Court of Appeals for the District of Columbia Circuit.

The White House had until Friday, October 19, to tell the court whether it was going to appeal. Friday came and went.

Meanwhile, we had been in disputes with Mr. Richardson and the White House for 3 months on our jurisdiction. Every time we touched upon national security we would get a call that we were exceeding our jurisdiction, and that was, in my opinion, because we did not yet know about Cointelpro, and the FBI. We did not know the full activity of the Plumbers, a group of White House employees, going beyond the bounds of law, to invade the psychiatrist of Daniel Ellsberg. We did not know the full extent of the activities of the ten White House employees who subsequently became felons as a result of our work. And the White House learned that we would acquire that knowledge.

Also on Friday, October 19, we were told by the White House, that we should subpoena no more tapes, and that we were to accept transcripts of the nine tapes from John Stennis, who, unfortunately, had been shot the previous January and was a 72-year-old ailing man.

Archie Cox of course refused, and we were confronted with the fact that the tapes, which were the only source of evidence to prove whether John Dean was telling the truth, were not to be ours. And Archie Cox could not accept that.

He so told the nation that Saturday morning, October 20, and we waited. We wondered who was going to fire Archie Cox, because the charter proscribed the firing of the Special Prosecutor under these circumstances and that regulation had the force and effect of law.

We knew that the tapes contained evidence of a criminal conspiracy between John Dean and the President of the United States, and we did not think anyone in the Justice Department would undertake to fire a prosecutor for securing evidence of a crime.

So we speculated as to who might do it, and we did not think Elliot Richardson would do it, but we had no idea who would.

About 8 o'clock that evening Mr. Cox called me and said the White House had sent a messenger. He called me 15 minutes later to say the messenger was lost, and he called me 15 minutes later to say he had been fired; and the remaining staff went into our offices.

From no one could we find out our status. I tried to reach Mr. Richardson. He was unavailable. Mr. Ruckelshaus was unavailable. Phil Lacovara, the counsel to the Special Prosecutor located Mr. Bork, who said we were now part of the Criminal Division in the Department of Justice.

I reached an old friend of mine, Henry Peterson—he still is a friend of mine—who was then head of the Criminal Division.

I said we had Mr. Haldeman coming to the grand jury Tuesday and we intended to do that unless I was instructed otherwise.

He said go ahead. I said we wanted to consolidate the files but the FBI had met us at the door and wouldn't let us move anything, wouldn't let us bring anything in or take anything out. Mr. Petersen said he couldn't do anything about that. We asked who was in charge, and he said, Mr. Bork.

For 6 or 7 days after that, the whole staff met about four times a day. We were totally tenuous in operation. We had no idea what was going to happen. We did not know if the President was going to produce the nine tapes in court on Tuesday, October 23. We did not know if we had authority to pursue more tapes which, after all, were at the heart of our investigations because taped conversations are the best evidence of all. They prevent a confrontation of one witness against another because the tapes tell exactly what happened.

Only after a week and a half did we think that we were going to be back in business. On Tuesday, October 23, there were 10 impeachment bills introduced. There were 15 bills introduced to create special prosecutors by law.

The White House was then totally on the defensive. We were afraid during that week that we were being used to perpetuate the Office of Special Prosecutor just to forestall the impeachment bills and the Special Prosecutor bills in the Congress.

We knew that Mr. Bork opposed special prosecutors as a concept, and I think he opposed them constitutionally, and he did that in good faith. He just didn't believe in them. We knew as well that, although we had the nine tapes as a result of the President's action on Tuesday the 23d, President Nixon had issued an order that we should not subpoena further tapes.

We were told by Mr. Bork and Mr. Petersen that we could ask for tapes and indeed we renewed old requests that had been pending when Archie Cox was fired; but we did not know when it came time to go to court what the Justice Department believed, i.e., what Acting Attorney General Bork believed, about executive privilege and about whether the court should order the production of the tapes.

As a result of the fire storm, the impeachment bills, the Special Prosecutor bills, the public reaction which, to us, was the most heartening and the congressional support which was overwhelming and for which we were all grateful, I think Nixon had to back down, and he brought in Leon Jaworski and the rest is known.

Senator KENNEDY. Mr. Frampton.

TESTIMONY OF GEORGE FRAMPTON

Mr. FRAMPTON. Thank you, Senator.

In conformation hearings before this committee in 1982, Judge Bork testified that there was never any possibility that the firing of Archibold Cox would, in any way, hamper the investigation or the prosecutions of the Special Prosecutor's Office.

According to his testimony in 1982, he was faced with a choice. If he refused to fire Archibold Cox, it would create, quote, "a very dangerous situation, one threatened the viability of the Department of Justice and of other parts of the executive branch." Those are his words.

On the other hand, he testified, if he moved to contain this dangerous situation by firing Mr. Cox, there would be, quote, "no threat to the investigations from the discharge and no threat to the processes of justice."

And to support this interpretation of his own decisionmaking processes that there would be no threat to the integrity of these investigations from the firing of Archibold Cox, Judge Bork testified that the day after the firing he met with Cox's two top aides and Henry Ruth and Phil Lacovara, and personally assured them that he wanted the Watergate investigation to continue just as before. Those are his words. That we would have complete independence and that he would, quote, "guard that independence, including our right to go to court to get the White House tapes or any other evidence that we wanted from the White House." Those are quotations from his confirmation hearings, his testimony in 1982.

In the past 2 weeks, Judge Bork has continued to insist that he did his utmost to keep the special prosecution force together and spent a lot of time trying to hold us together.

In the summer of 1973, I was one of several assistant Watergate special prosecutors charged with the responsibility for actually presenting witnesses and documents to the Watergate coverup grand jury, and I've been asked to testify here today, I presume, to provide some basic factual background from the point of view of those people who were actually working on the investigation day to day that will help the committee evaluate Judge Bork's position on these issues.

I think it is important when you consider the question of whether the firing of Archibold Cox affected the integrity of the investigation to recall that after John Dean testified under a grant of immunity in June 1983 that he had participated in a broad coverup and that the President had known about and supported that cover up that every one of the President's highest aides who could corroborate Dean, every single one denied Dean's testimony. The

President, the White House, Mr. Haldeman, Mr. Ehrlichman, Mr. Mitchell, Mr. Colson all disputed Dean.

And after the White House taping system was revealed, Mr. Haldeman even testified before the Senate Select Committee that he had listened to some of those tape recordings of conversations between Dean and President Nixon and that the tapes supported the President's version not Dean's.

So as of October 15, 1973, John Dean was out on a very long limb. It was his word against everybody else's. Ordinarily that would have been the end of it. Ordinarily no one would believe the word of a young, ambitious White House lawyer against the President of the United States, but in this very extraordinary situation, we had the opportunity to obtain absolutely uncontraverible evidence, evidence not subject to anybody's recollection or bias, that would determine who was telling the truth. It was also the case that that evidence was absolutely essential to any successful prosecution of Nixon's aides.

So when you talk about the integrity of the investigation, I think you have to recall that the tapes were the investigation. The investigation had no integrity without the White House tape recordings. Archibold Cox insisted on getting the tapes. The court of appeals held en banc that the grand jury was entitled to the tapes. He insisted on seeing the court decision implemented rather than accept a forced compromise, and he was fired to prevent the tapes from being disclosed.

Archibold Cox was not fired because of some personality conflict between him and the President. He wasn't fired because the President wanted to replace him with someone else. He was fired to avoid disclosing the evidence.

In light of that factual background I would submit to the committee that Judge Bork's testimony in 1982 that he did not believe that the firing of Cox would have any impact on the integrity of the investigation is absolutely untenable.

The second question relates to Judge Bork's testimony that within 24 hours after the firing of Cox he made assurances to us that our independence would be maintained and that we could pursue tapes and documents from the White House.

I think as Mr. Ruth set for the chronology the facts demonstrate that those assurances were not made and could not have been made. It wasn't until Tuesday afternoon following the Saturday night firing that the President's lawyers stated in court that they would turn over the tapes and that the President had reversed himself.

It wasn't until Friday that the President announced that Mr. Bork was going to be allowed to choose a new special prosecutor, but a new special prosecutor who would not be permitted to seek additional tapes and documents. It was not until the following Wednesday, October 31, that the President backed down on that issue, and he backed down on that issue because Leon Jaworski, his pick to replace Cox, went to the White House and told Al Haig that he wouldn't take the job unless he had at least the same assurances as Cox had had, and that included the right to go after additional tapes and documents.

So what you have here in both respects, I think, is a substantial reworking of the facts. More troubling than that reworking of the facts is the attitude that the Watergate events reflect an attitude of Judge Bork toward unrestrained executive power in the firing of Archibold Cox.

There were three things that stood in the way of Bork's firing Cox. One was a regulation which had the force and effect of law and which on its face forbid the firing of Cox without a finding of extraordinary improprieties.

The second and more important was a basic understanding and agreement which I think, Senator Kennedy, you pointed out this morning was made between the executive branch and the U.S. Senate. It was a pact. It was embodied in that regulation, but it was an understanding between the two branches of government. It was an understanding that the President would permit an independent investigation by disinterested persons in the executive branch to go after the evidence in no matter where it led.

And it was that understanding which constituted the foundation for the Senate's confirmation of Elliot Richardson, the appointment of Archibold Cox, and the forbearance of the Senate from moving forward on its own special prosecutor legislation which was under consideration in May 1973.

Now, Judge Bork's position on this is that he is not bound by the promise. Elliot Richardson made a promise to the committee, and he was not bound by that, and I say in all deference to Mr. Richardson that to treat that promise as a personal undertaking between Elliot Richardson and a few members of this committee is to trivialize it, is to roll the whole Watergate set of institutional problems up into a personal concern.

That was not a personal promise. It was an understanding between two branches of government, and it was just as binding on Robert Bork as it was on Elliot Richardson.

Now, this committee is faced with a very difficult task, to evaluate the entire record of the nominee including his judgment, his character, integrity, his views on the Supreme Court ideology.

No one would a would argue, and I'm certainly not here to argue to you today, that the events of Watergate should be dispositive of anyone's decision on this nomination, but I think the events and the testimony that Judge Bork has given on this issue in the past are part of his record.

They are a not unimportant part of the record, and they do, at least, offer a window, I believe, through which you may view something about the attitudes and the actions of this man, and the view through that window in several respects is a troubling one, both in terms of the reworking of the facts and in terms of the attitude toward executive power that I think it betrays.

Thank you, Mr. Chairman.

[Statement of Mr. Frampton follows:]

STATEMENT OF GEORGE T. FRAMPTON, JR.
FORMER ASSISTANT SPECIAL PROSECUTOR
WATERGATE SPECIAL PROSECUTION FORCE
BEFORE THE SENATE JUDICIARY COMMITTEE REGARDING
THE CONFIRMATION OF JUDGE ROBERT BORK FOR APPOINTMENT
TO JUSTICE OF THE UNITED STATES SUPREME COURT
SEPTEMBER 29, 1987

Mr. Chairman, my name is George T. Frampton, Jr. From June 1973 through March 1975 I was an Assistant Watergate Special Prosecutor. I worked on the "cover-up case." In the summer of 1973, I was one of several assistant prosecutors responsible for presenting witnesses and evidence to the Watergate grand jury. When the White House tapes were revealed, I was responsible for selecting the taped conversations that would be sought from the White House by subpoena.

After Watergate, while in private law practice in Washington, D.C., I was involved in a number of other special investigations: as Deputy Director of the independent Special Inquiry established by the Nuclear Regulatory Commission to investigate the Three Mile Island nuclear accident; as Deputy Independent Counsel to Jacob Stein in the 1984 investigation of Edwin Meese III; and in 1985 as Special Counsel to the State of Alaska in a state grand jury investigation. That investigation resulted in the Alaska legislature considering impeachment proceedings against the Governor of Alaska. In 1986 I left law practice to become President of The Wilderness Society, a non-profit national conservation organization with over 200,000 members that works to protect the integrity of federal public lands: national parks, forests and wildlife refuges. I have also taught a constitutional law course in Presidential Power as a visiting Lecturer at Duke Law School.

In confirmation hearings before this Committee in 1982, Judge Bork testified that "there was never any possibility" that the firing of Archibald Cox "would in any way hamper the investigation or the prosecutions of the Special Prosecutor's office." (Hearings at 9) According to his 1982 testimony, Bork was faced with a choice: if he refused to fire Cox, it would create a "very dangerous situation, one that threatened the viability of the Department of Justice and of other parts of the Executive Branch." (These are Judge Bork's own words.) On the other hand, if he moved to "contain" this situation by firing Cox there would be "no threat to the investigations from the discharge and no threat to the processes of justice." (Hearings at 10)

To support this interpretation of his own decision-making processes, Judge Bork claimed that the day after the firing of Mr. Cox, he met with Cox's two top aides, Henry Ruth and Philip Lacovara. Bork testified that he personally assured Ruth and Lacovara that he wanted the Watergate investigation to continue "as before," that we would have "complete independence" and that he would "guard that independence, including [our] right to go to court to get the White House tapes" or "any other evidence [we] wanted."

In the past two weeks, Judge Bork has continued to insist that he had always intended that the Watergate investigation would go on after the Saturday Night Massacre just as before, "in the same way" (September 16 at p. 7); that he personally "did his utmost to keep the Special Prosecution Force together" (id. at 8) and that he "spent a lot of time trying to hold the Watergate Special Prosecution Force together." (September 19 at p. 82)

I have been asked to testify today, I assume, to provide some basic background facts from the point of view of those actually charged with conducting the Watergate cover-up investigation on a day-to-day basis, which may assist the Committee in evaluating Judge Bork's position on these issues.

First, the question of whether the firing of Archibald Cox posed any threat to the integrity of the Watergate investigation.

In June 1973, John Dean testified under immunity in televised Senate hearings that President Nixon participated in a Watergate cover-up. The President and every one of his close aides who could corroborate Dean — former Attorney General Mitchell, H.R. Haldeman, John Ehrlichman, Charles Colson — all disputed Dean's version of events. In July 1973, the existence of the White House taping system was revealed. H.R. Haldeman testified that he personally had listened to tapes of some of the key Dean-Nixon conversations. The tapes themselves, Haldeman claimed, showed that the President, not Dean, was telling the truth about those meetings!

By October, resolution of this conflict in testimony was the critical factor to completing the Watergate investigation. Ordinarily, no one would have believed a young, ambitious White House lawyer against the word of the President of the United States and all of his closest advisers. But in this extraordinary time, there was evidence available to us — in the form of the White House tapes — absolutely incontrovertible evidence to resolve these issues. Obtaining the Nixon tapes therefore was a prerequisite to any successful prosecution of former high-ranking White House aides.

The Watergate Prosecutor insisted on the production of this evidence for the grand jury. The Court of Appeals, sitting en banc, agreed that the grand jury was entitled to have it. When the Prosecutor said he wanted to implement the Court's order, rather than accept an enforced compromise, he was fired.

It is important to remember when talking about the "integrity" of the Watergate investigation and whether it was affected by the removal of Mr. Cox that the tapes were the investigation. Without the tapes, the investigation was deprived of any integrity. To put it another way, it was our ability to obtain incontrovertible evidence of possible criminal conduct — the only way to resolve the conflicting testimony about the culpability of the President's top assistants — that gave the investigation integrity. Without that, it had none. Without the tapes, there could have been no prosecutions.

The firing of Archibald Cox did not result from a personality dispute between him and the President. It wasn't simply that the President didn't like Mr. Cox, or that he wanted to replace him with someone else. Cox was fired in order to prevent the Prosecutor and the grand jury from getting the tapes: the only evidence that could sustain successful prosecutions.

Viewed against these facts, Judge Bork's protestations that his firing of Archibald Cox posed no "threat" to the integrity of the investigation or to the legal process and did not pose any possibility of "hampering" that investigation, are plainly untenable.

Second, the chronology of events proves beyond dispute that the reassurances Judge Bork testified in 1982 that he gave the Watergate prosecutors after the Cox firing, of continued independence for the prosecution and ability to continue to pursue White House tapes, in fact were never given.

Judge Bork testified that those assurances were given on Sunday or Monday, after the Saturday night firing. To the contrary, it was not until Tuesday afternoon that the President's lawyers announced in court — following stern instructions by Judge Sirica that morning to the Watergate grand jury telling the jurors they were still in business — that the President had reversed himself and would turn over the subpoenaed tapes. This reversal followed not only a firestorm of public outrage but introduction of many impeachment resolutions that morning in the House of Representatives.

Indeed, on Tuesday afternoon Bork formally abrogated the departmental regulation establishing the Watergate Prosecution Force, and abolished our office. This action followed the filing of a lawsuit announced the previous day challenging the firing of Cox as illegal and plainly inconsistent with that regulation.

On Wednesday, Bork held a news conference at which he defended his actions. It was not until Friday that the President surprised the country by announcing that Bork would be allowed to appoint a new Special Prosecutor — albeit one who would not be permitted to seek any new White House tapes or other documentary evidence.

And it was not until the following Wednesday, October 31, when Leon Jaworski told Alexander Haig that he would not agree to become the new Special Prosecutor unless he were guaranteed the right to seek additional White House tapes, that the President capitulated on this issue as well.

In short, in his 1982 testimony, Judge Bork telescoped assurances that were grudgingly agreed to by the President himself over a period of about 12 days — in the face of overwhelming pressure from the Congress and the country — into a mere 24 hours. And he represented that those assurances were initiated by Judge Bork personally.

In light of the indisputable factual chronology, how does one evaluate Judge Bork's claim that the choice with which he was faced was between serious danger to the Justice Department, on the one hand, and no real damage to the Watergate investigation on the other? That he simply chose the lesser of two evils.

I would suggest to the Committee that another interpretation is possible, based on the facts. The choice Judge Bork was faced with was simple, but different. On the one hand there was the force of raw executive power: President Nixon ultimately had the power to find or appoint someone, at some point, as Acting Attorney General who would be willing to extinguish the Watergate investigation, in order to prevent the tapes from being disclosed.

On the other hand, there was the orderly process of law. That process included at least three things that stood in the way of the firing of Cox.

First, there was a valid and binding departmental regulation that on its face forbid the firing without a prior finding of "extraordinary improprieties," and also forbid the office from being abolished until its work had been completed or the special prosecutor had agreed.

Second, there was a fundamental understanding — a pact — between the Executive Branch and the Senate. That fundamental agreement was embodied not only in the regulation establishing the Watergate Prosecution Force but also in the confirmation of Elliot Richardson and appointment of Cox. It was an agreement that the President would consent to, and honor, a fully independent criminal investigation, to be conducted by a disinterested individual, to obtain whatever evidence was necessary to uncover the true facts about actions by White House officials in Watergate.

Judge Bork has said on a number of occasions that he felt he was not bound by the "promise" that had been made by Attorney General Richardson to the Senate to uphold Cox's independence — as though this were some kind of personal undertaking. With all deference to Mr. Richardson, the "promise" of an independent investigation was not his promise at all. It was the President's promise, made through Mr. Richardson, a representation on behalf of the Executive Branch. And it was an undertaking made for the purpose of ensuring that an Attorney General could be confirmed and that the Senate would not pursue proposals that were being pressed during May 1973 for legislation authorizing the courts to appoint their own special prosecutor to look into Watergate.

For Judge Bork to claim that this understanding between the two branches of government was merely a personal "promise" to which he was really not a party is to trivialize the true situation to an extreme.

Finally, there was the principle of the grand jury's disinterested and objective right to every man's evidence, the accepted process by which evidence of wrongdoing in our system may be adduced no matter how powerful the accused.

It did not take Acting Attorney General Bork long, at least not more than ten minutes by his own admission, to make the decision in favor of pure Executive power. The existence of the regulation, the importance of the underlying understanding between the Senate and the Executive Branch, the obvious abrogation of the grand jury process — none of these issues or problems seemed to trouble the Acting Attorney General in the slightest. Nor do they today.

On Tuesday following the Saturday night massacre, a lawsuit was filed by Ralph Nader (later joined by members of Congress) challenging the firing of Cox. A federal district judge ruled in November 1973 that the firing violated the charter regulation. Ten months later, after President Nixon had resigned, Bork's appeal of the district court decision was held moot by the Court of Appeals. As I understand it, Judge Bork has advanced two somewhat conflicting arguments in response to the reasoning of the court in this case.

First, he has argued that on that Saturday night he could not find a secretary to type a two-sentence order revoking the regulation, so that his action was only illegal for a couple of days — a mere technicality. (Notably, the letter firing Mr. Cox, signed Saturday night, was itself typed.)

Second, Judge Bork has argued that executive branch departmental regulations are binding only on members of the department, and that a direct Presidential order to a cabinet member either overrides the regulation or insulates the cabinet member from having to obey the regulation.

I think it may be worth pointing out, since no one else in these hearings has done so to my knowledge, that no such doctrine of executive power has ever been identified by anyone. I would suggest that none exists: that it was made up by Judge Bork after the fact to justify his act in this particular situation.

It is this kind of imaginative creation of "new" doctrine to justify the exercise of unrestrained executive power that we depend upon the United States Supreme Court to view with great scepticism and, where appropriate, to stop dead in its tracks.

* * *

In 1973, Judge Bork justified his willingness to fire Mr. Cox by saying, in essence, that the President would eventually find someone to do it, and it might as well be Bork.

In 1982, Judge Bork characterized his decision as a difficult balancing of relative harms, and claimed that he never thought his action would impair the integrity of the Watergate investigation.

In 1987, he has practically taken credit for keeping the Watergate Prosecution Force intact. His reputation depended on it, he has testified. (Indeed, by Monday or Tuesday following the Saturday Night Massacre and the accompanying firestorm of public outrage and congressional condemnation, he probably realized that his reputation did depend on President Nixon backing down.) According to Judge Bork, it would seem that his highest priority was to work diligently to ensure that the Special Prosecution Force maintained its independence and carried on its work unimpaired.

This is not a case of Judge Bork reworking his views of constitutional doctrine. This is a case of reworking the facts.

# # #

Senator KENNEDY. Thank you very much, Mr. Ruth, and Mr. Frampton.

In recalling the time of the development of the Special Prosecutor, let me say that your understanding of that history, I can say as a member of the Judiciary Committee at the time, was certainly the view of all of the members of the panel.

Otherwise, just a personal comment. With all respect, and I have great respect for Mr. Richardson, his understanding really defies both logic and understanding given the kind of climate and atmosphere which you and Mr. Ruth have described so well here before the committee.

Just a few questions. Mr. Ruth, we are obviously pleased too have you today. As you testified, those tapes were at the heart of your investigation. The question has arisen regarding whether Judge Bork, after Mr. Cox was fired, told you that you could seek the tapes.

Now, in his testimony before this committee at his confirmation hearing for the circuit court in 1982, Judge Bork testified that on Sunday afternoon, after he fired Mr. Cox, he met with you, Mr. Petersen, Mr. Lacovara, and in Judge Bork's words, "I told them I wanted them to continue as before with their investigation and with their prosecutions, that they could have complete independence, and that I would guard that independence, including their right to go to court to get the White House tapes or any other evidence they wanted. Therefore, I authorized them to do what they had been doing under Mr. Cox."

Would you tell the committee please whether that statement is accurate? Did Judge Bork assure you, as he testified, that the office could go after the same tapes that Mr. Cox had just been fired for pursuing?

Mr. RUTH. I think, Senator, Phil Lacovara—Phil was counsel to the Special Prosecutor—Phil and I met with Henry Petersen from the Criminal Division and Mr. Bork, I think it was Monday night, October 22. It was a very tense meeting which quickly went downhill, and rather than have it collapse completely, we adjourned it shortly after it began.

The only subject of that meeting that we actually got to, aside from an irrelevancy, was whether we should show up Tuesday morning and continue our work, and the answer to that was yes.

No one in that room had any power, in my opinion, to do anything about the tapes. Mr. Bork was entirely irrelevant. The show was being run by the White House, and indeed, the President hadn't even decided Monday night whether or not to produce the nine subpoenaed tapes the next day in court on Tuesday afternoon.

So we assumed that Mr. Bork agreed with the President that the President had complete power to order Bork to fire Cox without abolishing the regulation, because that's what happened.

And we assumed that Mr. Bork agreed with the President on that executive privilege extended to Presidential conversations even when those conversations were part of a criminal conspiracy; and we had to assume that other than proceeding from day to day, no one in that room on that Monday night knew what was going to happen the next time we subpoenaed a tape and the court upheld it and the President said no.

Mr. Bork never told us his position on that issue.

Senator **Kennedy**. That's exactly what I want to understand. He testified in 1982, "including their right to go to court to get the White House tapes or any other evidence they wanted."

Mr. **Ruth**. That subject of tapes, Senator, didn't come up until about the following Wednesday when we all agreed we would renew an old letter request for tapes and for documents particularly that had not yet been produced by the White House.

Senator **Kennedy**. Let me just move on to ask about a second factual issue that has arisen. According to a memorandum prepared by former Transportation Secretary, Mr. Coleman, Judge Bork told Mr. Coleman that, quote, "immediately after firing Mr. Cox, Judge Bork set out to find a new Watergate Special Prosecutor."

But in his testimony before the committee during these hearings, Judge Bork said that at the time of the firing, and I quote, "We did not contemplate a new Special Prosecutor. We contemplated that the investigations would be brought effectively by Mr. Ruth and Mr. Lacovara in their old building with the same staff in the same way. There was no contemplation of a new Special Prosecutor until it became clear that the public wanted one."

Then he continued. "We did not initially contemplate a new Special Prosecutor until we saw that it was necessary because the American people would not be mollified without one."

Would you tell us please which of Judge Bork's statements is accurate? His statement that he immediately set out to find a new Special Prosecutor or his statement that he did not do so until the American people indicated that they wouldn't be mollified without one?

Mr. **Ruth**. I think the latter, Senator. The following Tuesday Mr. Bork abolished the Watergate special prosecution force, 3 days after the massacre, and then in the ensuing month he testified against a special prosecutor bill because he thought it had too many constitutional problems.

We never thought that Mr. Bork was in favor of a new Special Prosecutor, and the only reason we were staying as a unit was because we thought that the public and the congressional reaction were going to force Mr. Nixon to appoint a special prosecutor.

Senator **Kennedy**. Just a final thought, and then I'll conclude my questioning. So isn't it fair to say that at the time that Mr. Cox was fired there was absolutely no assurance either that the office could go after the Nixon tapes or that there would be a new Special Prosecutor, and if the American people had not erupted into the famous fire storm after the firing, it is conceivable, is it not, that your investigation would have been left under the control of the Justice Department, stripped of all authority to pursue evidence of presidential wrongdoings?

Mr. **Ruth**. I think that, but for the firestorm, Senator, the reaction of the Justice Department and the White House was to keep us within the Criminal Division.

Senator **Kennedy**. The Senator from South Carolina.

Senator **Thurmond**. Thank you. Mr. Ruth, Mr. Frampton, we are glad to have you here. Former Attorney General Richardson testified today. Did you hear his testimony?

Mr. RUTH. Yes, sir.

Senator THURMOND. I see it in his testimony—he said, Robert Bork's actions in the aftermath of the Cox dismissal contributed to the continuation and ultimate success of the Watergate investigation. He took immediate steps to keep the Watergate Special Prosecution Force together and insisted that it retain responsibility for the investigation. Now, Mr. Ruth, earlier today, former Attorney General Eliott Richardson testified that Judge Bork did nothing improper or unethical when he carried out the firing of Archibald Cox. Additionally, Mr. Richardson stated that Judge Bork's actions in this matter were in the best interests of the Department of Justice and of the country. I just want to call attention to those statements that he made.

Mr. RUTH. Yes, sir. The way I heard Mr. Richardson's testimony was that he really did not know what happened after he left. I think he said he had second- and third-hand accounts and from those second and third-hand accounts, he thought that Mr. Bork acquitted himself well. In fact, Senator, I just do not want history rewritten just to confirm a Supreme Court Justice. The fact is, Mr. Bork was irrelevant to our continuation.

Senator KENNEDY. Was what?

Mr. RUTH. Irrelevant. He had nothing to do with it. We saw him as not a factor in any decision that we were making and we saw him as powerless to cause anything to happen. I do not see any reason to rewrite that history.

Senator THURMOND. Mr. Ruth, on July 2, 1987, the Los Angeles Times quoted you as follows: "Cox's deputy, who later became the third of the Watergate Special Prosecutors said he believed Bork acted honorably throughout the affair and cited Bork's selection of Houston lawyer, Leon Jaworski, an aggressive counsel to replace Cox. Ruth, asked if he though ambition for a possible spot on the Supreme Court might have led Bork to follow Nixon's order said, even I am not that cynical. He did not act that way. Clearly, he did not march in lockstep with the White House concept to abolish us and make our lawyers part of the Justice Department." Is that quoting you correctly?

Mr. RUTH. Probably, Senator. If you want me to explain it—I have never thought that Mr. Bork acted in any way other than with good intention. I just happen to believe that he believes in the totality of executive power and executive privilege. I do not think he selected Leon Jaworski, however. That part of the quote mystifies me a little bit. Mr. Bork met with our staff the Wednesday following the Saturday night massacre and a number of us pressed him, is there going to be another Special Prosecutor? Are you looking for another Special Prosecutor? We got no answer.

Senator KENNEDY. That was when?

Mr. RUTH. That was Wednesday after the Saturday night massacre, Senator Kennedy.

Senator THURMOND. I believe on Monday, he called Mr. Dallin Oaks and asked him to recommend a prosecutor. Are you familiar with that?

Mr. RUTH. No, sir.

Senator THURMOND. Mr. Oaks testified to that yesterday.

Mr. RUTH. Mr. Bork had no power to appoint a Special Prosecutor then. The White House did not decide that, Senator, until Friday or Saturday.

Senator HATCH. No, but what the testimony was—if I could help Senator Thurmond—what the testimony was is Dallin Oaks, who was former president of Brigham Young University, who was the executive director of the American Bar Foundation in his career, professor at the University of Chicago——

Mr. RUTH. I know Dallin Oaks.

Senator HATCH. I know you know him. You have confidence in his veracity, I take it.

Mr. RUTH. I am not aware that he is a prosecutor, sir. I do have confidence in his veracity.

Senator HATCH. All right. Dallin Oaks came and said that Robert Bork called him Monday morning, his best recollection was, and said I am in a bind. I have got to find a Special Prosecutor and I think it has got to be somebody who is a former president of the American Bar Association and I have got to call my friends who I know will give me the straight scoop and so I am calling you among others.

He suggested Lewis Powell, who had just been put on the Supreme Court and he said there is only one other and that is Leon Jaworski. He said, well, I have had him recommended by others as well, which indicated that he had been calling ever since the firing of Cox to try and see just what he could do to have a very competent, good prosecutor. Of course, as we all know, Jaworski was chosen and went on to become, I think, a very historic good figure because of the work he did on Watergate. So, if you missed that yesterday, you missed a pretty good thing.

Senator THURMOND. Are you familiar with that, Mr. Ruth?

Mr. RUTH. No, sir. The issue was not just the Special Prosecutor, as you know, Senator Hatch.

Senator HATCH. I know that.

Mr. RUTH. The issue was the power of the next Special Prosecutor. The issue was, could that Special Prosecutor subpoena Presidential tapes, and if the court ordered the tapes to be produced, would the Attorney General stay with us and say, yes, the law requires that production.

Senator HATCH. And Jaworski did?

Mr. RUTH. Excuse me, sir.

Senator KENNEDY. Let the witness finish.

Senator HATCH. Sure, sure.

Mr. RUTH. Mr. Bork, on Saturday night, fired Archibald Cox for doing just that. I had no reason to believe that Mr. Bork had undertaken a conversion in 48 hours and suddenly believed that Mr. Cox was now right and all we needed was another body to do the same thing.

Senator HATCH. With all due respect, that is the significance of the Dallin Oaks' testimony, because this impeccable person has testified that Bork was going to do exactly that and to put it the way it really was, what Bork wanted to do was find an equivalent Special Prosecutor because the President had asked to have Cox fired, who would take his place and then the facts are that Bork backed him and so did everybody else and the matter became resolved because of that Special Prosecutor. So, to try to imply that Bork was not doing right, I think is wrong.

Mr. RUTH. I am not trying to imply anything. We met with Mr. Bork that Monday——

Senator KENNEDY. Well, let both Mr. Ruth and Mr. Frampton make a brief comment, if they could, and then the time——

Senator THURMOND. Any other statements you want to make?

Mr. RUTH. Well, I just wanted to say that Monday night, if that happened on Monday, we met——

Senator HATCH. Monday morning, if——

Senator KENNEDY. Let the witness finish his answer. We will insist that the witness finish without interruption. Would Mr. Ruth respond and then Mr. Frampton?

Senator THURMOND. Are you through, Mr. Ruth, or not?

Mr. RUTH. No, sir.

Senator HATCH. Go ahead. We will listen.

Mr. RUTH. If that happened between Mr. Bork and Mr. Oaks on Monday morning, it surely would have been good to know that on Monday evening, when Mr. Locavara and I met with Mr. Bork for our first assurance of what we were, what we were going to become, and what was our power to be. At no time did Mr. Bork tell us that there was a contemplation of another Special Prosecutor and if he had told us, we would not have been meeting four times a day to save the Watergate Special Prosecution Force.

Senator KENNEDY. Mr. Frampton.

Mr. FRAMPTON. If Judge Bork was looking for a new Special Prosecutor on Monday after the firing, then he misrepresented his views to us on Wednesday, when he met with the prosecutor's staff and told us that neither he nor the Justice Department would support a new Special Prosecutor. On Friday, when the President announced that he would be out looking for a new Special Prosecutor, in his press conference he said that one of the conditions on the new Special Prosecutor, the key condition, was that the new Special Prosecutor would not be permitted to seek new tapes and documents.

I do not think there is any dispute. I can recall Leon Jaworski telling us himself about this many months later, that it was his insistence, his insistence on acceding to the same authority, indeed, more authority after consultation with Congress, more authority than Cox had, that is a condition of his taking the job, that Alexander Haig went to see the President and came back and told him that the President would back off on that and would permit Jaworski to have the same independence that Cox had. That did not happen until 12 days after the Saturday night massacre.

Senator KENNEDY. I just want to finally mention this. Do you find it strange that he is talking to the White House on Monday and then issuing the order to abolish the Special Prosecutor's office on Tuesday?

Mr. FRAMPTON. Could I respond to that, Senator?

Senator THURMOND. Just a minute now. You cut in on me and so has Senator Hatch. Just let me get through. I had the floor.

Senator KENNEDY. Can he——

Senator THURMOND. No, just let me get through. I will be through in a minute. I had the floor. I only have this statement to make. Mr. Richardson stated that Judge Bork's actions in this matter were in the best interests of the Department of Justice and the country. Do you agree with that or not?

Mr. **Frampton.** I am sorry, Senator, I did not hear the entire quote.

Senator **Thurmond.** I will repeat it. Mr. Richardson, the former Attorney General, testified here this morning, stated that Judge Bork's actions in this matter were in the best interests of the Department of Justice and the country. I just asked you a simple question. Do you agree with that or not?

Mr. **Frampton.** I cannot answer that yes or no, Senator. I would characterize Judge Bork's role, in the weeks after the Saturday night massacre, as basically a leaf, floating on an ocean during a hurricane. The outcome of the integrity of the investigation and the prosecution was going to be shaped by events far beyond his control and was shaped by events far beyond his control. As Mr. Ruth said, he was an irrelevant player in this.

Senator **Thurmond.** Well, you would not contradict his statement then, would you?

Mr. **Frampton.** I would, yes.

Senator **Thurmond.** Well, that is what I asked you. Whether you agreed with him or not.

Mr. **Ruth.** No, sir.

Mr. **Frampton.** No, sir.

Senator **Thurmond.** That is all, Senator Kennedy.

Senator **Kennedy.** Now, can you answer my question? I will just ask this one and then I will have to go to the floor. Do you find it strange that evidently he is talking to the White House on Monday about a Special Prosecutor and then Judge Bork abolishes the whole office on Tuesday?

Mr. **Frampton.** It is strange, Senator, if that is the true sequence of events. There was a lawsuit filed Tuesday morning and had been announced Monday.

Senator **Kennedy.** I would ask that a copy of that particular copy of that particular abolishment of the Office of Watergate Special Prosecutor Force, issued on that particular day, be made part of the record.

[Above-mentioned copy follows:]

ABOLITION OF WSPF IN OCTOBER 1973

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

PART 0—ORGANIZATION OF THE DEPARTMENT OF JUSTICE

Order No. 546-73

ABOLISHMENT OF OFFICE OF WATERGATE SPECIAL PROSECUTION FORCE

This order abolishes the Office of Watergate Special Prosecution Force. The functions of that Office revert to the Criminal Division.

By virtue of the authority vested in me by 28 U.S.C. 509, 510 and 5 U.S.C. 301, the Office of Watergate Special Prosecution Force is abolished. Accordingly, Part 0 of Chapter I of Title 28, Code of Federal Regulations, is amended as follows:

1. Section 0.1 of Subpart A, which lists the organizational units of the Department, is amended by deleting "Office of Watergate Special Prosecution Force."

2. Subpart G-1 is revoked.

Order No. 517-73 of May 31, 1973, Order No. 518-73 of May 31, 1973, Order No. 525-73 of July 8, 1973, and Order No. 531-73 of July 31, 1973, are revoked.

This order is effective as of October 21, 1973.

/S/ ROBERT H. BORK,
Acting Attorney General.

Date: Oct. 23, 1973.

Mr. **Ruth**. Senator, he had to abolish us in order to make the Cox firing legal.

Senator **Kennedy**. Well, is it strange that if he is thinking about it on Monday, that he going to continue the office, that he would abolish it on Tuesday?

Mr. **Ruth**. I do not think he believed in Special Prosecutors, sir. I think it was a reaction to the firestorm and the impeachment bills and the Special Prosecutor bills. I think it was a fairly pragmatic reaction.

Senator **Metzenbaum**. Mr. Chairman, I have been very patient while the distinguished minority member and Senator Hatch have taken far over the normal time and I may take a little bit over myself, under the circumstances. I think it is important to point out that the statement that has been urged upon this hearing today by the Senator from Utah that Judge Bork immediately acted to find another prosecutor need not be contradicted only by Mr. Frampton and Mr. Ruth. It is contradicted directly by Judge Bork.

I asked him the question: "But you had no guarantee from President Nixon at the time you fired Mr. Cox, that there would even be another Special Prosecutor. Is it not a fact that the decision to appoint a new Special Prosecutor was not made until several days later after the President had provoked a firestorm of controversy around the country." And Judge Bork testified that is right: "Initially, we intended to leave the Special Prosecution Force intact, but not to appoint a new Special Prosecutor.

"We did not, initially, contemplate a new Special Prosecutor until we saw that it was necessary because the American people would not be mollified without one." So, when it is suggested that the next day on Monday, that he was looking for a new Special Prosecutor, I think it borders on the realm of absurdity. It just is not in accordance with the facts.

Mr. Frampton, I would like to ask you. Have you spoken with any of your former colleagues in the Watergate Prosecution Force, since Judge Bork has testified during these hearings and if so, what was their reaction?

Mr. **Frampton**. Other than Mr. Ruth, I will recount the only reaction that I have had, Senator. I did not watch Judge Bork testify the week before last, but in the conclusion of his testimony on Saturday, in answer to questions that were asked by Senator Kennedy, he did advert to the Watergate issue and he characterized his actions as being one of working hard to keep the Special Prosecution Force together. I have a very close colleague who saw that on television and telephoned me and he was apoplectic about it. He said, and I think that the history of the testimony shows, as I said before, a re-working of the facts.

In 1973, Judge Bork said, in essence, the President was going to find someone to fire Cox and it might as well be Bork. In 1982, in his confirmation hearings before this committee, the testimony I saw for the first time 6 weeks ago, he said, well, I was faced with a very difficult balancing of relative evils. On the one hand, the Justice Department might collapse. On the other hand, if I fired Cox, there would not be any threat to the integrity of the investigation, and I chose the lesser evil. By 1987, he is claiming to be the hero of

Watergate. That is the reaction that I have had from my colleagues.

Senator METZENBAUM. Mr. Ruth, during Judge Bork's testimony in this committee on Saturday, September 19, he stated "I have repeatedly explained that I was the last man in the Department who could hold the Department together. I spent a lot of time trying to hold the Watergate Special Prosecution Force together. It was held together. It went forward with the results we all know." The American Bar Association's summary of its September 2 interview states "Judge Bork said that he had gone to great lengths to assure that none of the staff resigned." Is that an accurate characterization of what happened, in your view?

Mr. RUTH. Judge Bork and Henry Peterson told us to continue with our work, Senator. Judge Bork was irrelevant to whether our staff was going to stay together because we had no way of relying on anything he said at the time because he fired Archie Cox for pursuing evidence of criminal conversations by the President of the United States. The staff held together because of the integrity of the staff and the support of the public and the Congress in the hope that a new Special Prosecutor would come along. Judge Bork was neither a positive nor a negative in that respect. We did not pay any attention to him, Senator.

Senator METZENBAUM. Were you or any member of the Watergate Special Prosecution Force consulted before Judge Bork fired Mr. Cox?

Mr. RUTH. Sir?

Senator METZENBAUM. Were you or Mr. Lacovara or any member of the Watergate Prosecution Force consulted before Judge Bork fired Mr. Cox?

Mr. RUTH. No, sir. Mr. Bork made no inquiry about the state of the evidence or whether the firing would interfere with our investigation nor did anyone.

Senator METZENBAUM. Mr. Ruth, we all know the Watergate investigation eventually was allowed to proceed and the American people were assured that no person, even the President, is above the law. But how things turned out is not the crucial question for us. The question for us in evaluating Judge Bork is whether, at the time these events unfolded, the entire investigation was put in jeopardy. Do you believe that the firing of Mr. Cox put at risk the very fundamental principle of a complete and unhindered investigation of the White House and the President?

Mr. RUTH. Certainly, Senator. Senator, could I just add to that? I do not think either of us are saying that Bob Bork was an evil man at the time. What we are saying is we thought he believed in total executive power, the power of the President to do whatever he wanted and to take privilege whenever he wanted it.

That, in fact, is inconsistent with a criminal investigation of the President of the United States who has held conversations with his own lawyer, which are criminal in nature, and in furtherance of a criminal conspiracy and which exist on tape. The idea that executive privilege could possibly exist in that situation would never cross my mind. We thought it had crossed Mr. Bork's mind and he believed that privilege would prevail. That is why we could not rely on him.

Senator **Metzenbaum**. Just one last short question. As I understand, you are general counsel for one of the major corporations of America at the present?

Mr. **Ruth**. No, sir.

Senator **Metzenbaum**. Pardon?

Mr. **Ruth**. No, sir. I do not want to be general counsel. That involves administration. I am special litigation counsel at UNISYS Corp. However, I am here speaking for myself.

Senator **Metzenbaum**. You are what? You are litigation counsel for UNISYS, is that right?

Mr. **Ruth**. Special litigation counsel, sir. I have a number of different duties.

Senator **Metzenbaum**. Thank you very much. And you are head of the Wilderness Society?

Mr. **Frampton**. Yes, Senator.

Senator **Metzenbaum**. Thank you, sir.

Senator **Kennedy**. Senator Hatch.

Senator **Hatch**. Thank you, Senator Kennedy. Let me just say at this time, I would like to submit for the record the statements of Philip A. Lacovara and Henry Peterson and an affidavit by Ralph K. Winter, if that is all right.

Senator **Kennedy**. They may be a part of the record.

[Submissions for the record follow:]

Statement of

PHILIP A. LACOVARA

FORMERLY COUNSEL TO THE WATERGATE SPECIAL PROSECUTOR

During the hearings on the nomination of Judge Robert H. Bork to be an Associate Justice of the Supreme Court, a number of questions have arisen about his role in the so-called "Saturday Night Massacre" and the events immediately following it. Since I was a personal participant in many of the events about which Judge Bork has been examined, I want to make certain that the record accurately reflects what occurred, as I have already reported to the Staff of the Judiciary Committee. In sum, the substance of Judge Bork's testimony, as I understand it, accurately reflects the tone and direction of his statements to the senior staff of the Watergate Special Prosecution Force in the hours and days after his dismissal of Special Prosecutor Archibald Cox.

I

From early July 1973 until the end of September 1974, I served as Counsel to the Special Prosecutor, Watergate Special Prosecution Force. In that role, I was the lawyer primarily responsible for advising Special Prosecutor Archibald Cox and then his replacement, Leon Jaworski, on legal and policy matters. I was also in charge of litigation of these issues. In particular, I was responsible for advising the Special Prosecutors on questions of executive privilege, including particularly subpoenas for production of White House tapes. Deputy Special Prosecutor Henry S. Ruth and I were the two senior members of the large staff that Mr. Cox had assembled as part of the Watergate Special Prosecution Force.

II

As I understand it, one of the main questions raised about the testimony Judge Bork has given both during his 1982 confirmation hearings for his seat on the Court of Appeals and during his current hearings is whether his recollection of his conduct immediately after the dismissal of Mr. Cox on Saturday, October 20, 1973, represents "revisionist history" and whether he was only willing to cooperate with the Watergate investigations after he detected the so-called "fire storm" that developed in the days following the dismissal of Mr. Cox. I was there, and it is unfair and inaccurate to insinuate that Judge Bork has shaded his testimony.

III

At the outset, I want to state, as I have in print before, that I thought at the time and continue to think now that Judge Bork made the "wrong" decision when he decided to comply with President Nixon's instruction to dismiss Mr. Cox, rather than to follow the path chosen by Attorney General Richardson and Deputy Attorney General Ruckelshaus. Nevertheless, from the first conversation that I had with Mr. Bork on the evening of the Saturday Night Massacre and from subsequent conversations, I have been satisfied that he acted for what were reasoned and reasonable motives and that his conduct was in all respects honorable.

IV

After the early evening announcement on Saturday, October 20, of the dismissal of Mr. Cox, most of the members of the staff of the Watergate Special Prosecutor's office gathered at the headquarters of the prosecution team to consider whether the dismissal would undermine or abort the many ongoing investigations under our jurisdiction. At 9:50 p.m. that night, I telephoned Mr. Bork at his home to discuss that issue, and specifically to learn whether he had intended to discharge the Assistant Special Prosecutor who had actually been conducting the investigations.

It would be hard to overstate the importance of that question. In the five months since his appointment as Special Prosecutor, Mr. Cox had assembled a staff of approximately 35 Assistant Special Prosecutors who had already commenced a number of grand jury proceedings into the Watergate break-in and cover-up and into a variety of other highly sensitive matters assigned to the Watergate Special Prosecution Force. Mr. Cox had carefully recruited his staff to assure that they would be completely independent of any governmental or political relationship that would call into question their objectivity and independence. Each of the staff prosecutors was specially appointed for this assignment. If Mr. Bork as Acting Attorney General had not only dismissed Mr. Cox, but also dissolved the staff and terminated the special appointments, there would have been substantial and perhaps irreparable obstruction of the ongoing criminal investigations.

During my conversation with Mr. Bork within a few hours of the announcement of Mr. Cox's dismissal, however, he assured me that he had not endeavored to do anything beyond follow the narrowest interpretation of the President's instruction, which was to dismiss Mr. Cox. Although I expressed to him in the strongest possible terms my objection to that decision, he provided to me the same explanation that he has provided on many occasions since then: that in his discussions with Attorney General Richardson about the options, he had concluded, and that Mr. Richardson had concurred, that the personal pledge of tenure that the Attorney General had given when he selected Professor Cox did not apply to other officials of the Department of Justice; that in Mr. Bork's view the President had the lawful constitutional power to order the dismissal of any employee of the executive branch in a position such as Mr. Cox's; and that, most important, his decision to take the course that he initially favored--to resign rather than to execute the President's directive--would have established a pattern causing the resignation of all policy level officials of the Justice Department, thus leaving thousands of ongoing civil and criminal matters without policy level direction.

Mr. Bork assured me that his compliance with the instruction to discharge Mr. Cox had no effect on the authority or tenure of the several dozen prosecutors who had been conducting the investigations under Mr. Cox's jurisdiction. I promptly reported that assurance to the staff.

V

From 6 p.m. until 8:15 p.m. on Monday, October 22nd, Deputy Special Prosecutor Ruth and I met with Acting Attorney General Bork and the head of the Criminal Division, Henry Petersen, to discuss the continued pursuit of the investigations. Although that meeting was quite heated--largely because of exchanges between Mr. Petersen and me--my distinct recollection of the tone of the meeting was that Mr. Bork was sincerely dismayed that I might perceive his action as an effort to interfere with the administration of justice. He repeated to Mr. Ruth and me the same explanation that he had given me on Saturday night for his reluctant decision to obey the President's direction. He said that he had been confident that, at some point after the entire policy level of the Department of Justice had been wiped out in a pattern of resignations, some senior civil servant next in line to become "Acting Attorney General" would have obeyed the President's instruction and ordered Cox's dismissal. Since the result was, in Mr. Bork's view, inevitable, since he considered the order--however unwise--to be within the President's constitutional power, and since he regarded mass resignations at the Department of Justice as a greater obstacle to the administration of justice, he explained that he had decided to implement the directive.

At that meeting he repeated the assurance that he had given within hours of dismissing Mr. Cox that he hoped that the staff that Mr. Cox had assembled was to remain on duty. Although the Watergate Special Prosecution Force would formally become part of the Criminal Division, subject to general oversight by Assistant Attorney General Petersen, a career Justice Department prosecutor, whose integrity had never been at issue, both Acting Attorney General Bork and Mr. Petersen repeatedly insisted that they expected a full and thorough investigation of all the matters under our jurisdiction. Both men made it clear that they would not be parties to any effort to impede these investigations or to cover up any criminal involvement by any White House officials.

One of my most vivid recollections of that evening is that it was plain that, because of his peripheral role as Solicitor General, Mr. Bork had not been familiar with the depth and scope of the sensitive investigations assigned to the Watergate Special Prosecutor beyond those that have come to be known as the "Watergate" investigations. Some of those investigations involved not only allegations against senior White House officials, including the President, but also allegations about then-present or former officers of the Department of Justice itself. When I explained that it was the existence and delicacy of those investigations that underscored the need for a Special Prosecutor, Mr. Bork appeared to recognize that the affair had dimensions that he had not previously appreciated.

Despite some suggestions by others to the contrary, Mr. Bork reiterated that night his commitment to full and vigorous investigations as long as he remained Acting Attorney General. I specifically recall the assurances that he and Assistant Attorney General Petersen gave that the investigations would proceed on an objective, thorough and professional basis and would seek whatever evidence was relevant in determining guilt or innocence of the persons under investigation.

None of the four men meeting in the Solicitor General's office that evening knew precisely what would happen next, and both Mr. Bork and Mr. Petersen urged Henry Ruth and me to do whatever we could to keep the staff together and to remain at our posts as well. We left for later discussion the determination of precisely what investigative methods to use in pursuing the investigations.

Later that night and then again the following morning, Tuesday, October 23rd, Henry Ruth and I met with the rest of the staff to convey to them the assurances that we had received from Acting Attorney General Bork and Mr. Petersen that they wanted the investigations to continue vigorously and that they would protect the integrity of those investigations. As a result of those assurances, Mr. Ruth and I, and the remainder of the staff, resolved that we would continue to conduct the kind of independent investigations that Professor Cox had hired us to pursue, unless and until either Mr. Bork or Mr. Petersen took action inconsistent with those assurances.

VI

There was no such contrary action from either man. Later that morning, Tuesday, October 23--the first business day after the "Saturday Night Massacre" and the first day possible for court proceedings--I spoke with Acting Attorney General Bork to tell him that the staff would remain on duty. I also informed him that it was our intention to take an action that would necessarily be regarded as a direct attack on the instructions that General Alexander Haig, President Nixon's White House Chief of Staff, had given as part of the "Saturday Night Massacre": the instructions to the Federal Bureau of Investigation and then subsequently to the United States Marshal's Service to take custody of the investigative files that the Watergate Special Prosecution Force had developed. The action that we were planning to take, I informed Mr. Bork, was to ask Chief Judge John Sirica, in his capacity as the judge supervising the federal grand juries, to issue a protective order placing all of the investigations files under the custody of the lawyers in the Watergate Special Prosecution Force as "agents" of the grand jury, and enjoining any other officials of the government from interfering with our custody and use of those materials. That action was intended to override directly any assertion of White House power to assume control of our sensitive investigative files.

Despite the obviously sensitive nature of that plan, Acting Attorney General Bork assured me that he concurred with it and was prepared to "stipulate" to the entry of the order, although he expressed concern that no one should infer from it that either he or Mr. Petersen would otherwise be "looting" the files. Mr. Bork gave me this assurance before the President's lawyer, Charles Alan Wright, later announced that the President was going to comply with the subpoena for White House tapes.

As further evidence of the reliability of the assurances that both Mr. Bork and Mr. Petersen had given us about their support for the integrity and independence of investigations of high level misconduct, free from White House interference, Assistant Attorney General Petersen personally joined the petition that I had informed Mr. Bork we would be filing to obtain a protective order prohibiting anyone from removing any grand jury records from the office of the staff of the Watergate Special Prosecution Force.

In addition, there was a question about who should represent the Government in the proceedings that Chief Judge Sirica scheduled for the afternoon of Tuesday, October 23, to ascertain whether the President would comply with the order of the Court of Appeals requiring production of the White House tapes. After we gave Mr. Petersen general briefings on the scope of the investigations that we were conducting, and specifically on the positions that the Watergate Special Prosecution staff was planning to take in further court proceedings over the subpoenaed tapes, Acting Attorney General Bork expressly agreed that the lawyers whom Archibald Cox had selected should continue to handle all court proceedings relating to matters under our jurisdiction.

Indeed, to the best of my recollection, Mr. Bork and Mr. Petersen approved every recommendation that we made between the "Saturday Night Massacre" and the appointment of Leon Jaworski as the new Special Prosecutor.

VII

It is, therefore, unfair and inaccurate to suggest that Mr. Bork's recollection of the events surrounding the "Saturday Night Massacre" and his posture in those events has been skewed either by the "fire storm" that began building during the following week or by the desire to win confirmation of his nomination to the Supreme Court. My recollection of the events in which I personally participated is substantially the same as his. I am very clear on this, because, as I mentioned earlier, I have always been of the view that Mr. Bork should have made a different judgment when he decided to obey the order to discharge Professor Cox, and I was quite alert to any indication that the judgment he did make reflected a desire to impede or undermine the integrity and vigor of the investigations that Mr. Cox was supervising.

Moreover, my impressions do not stand alone. In October 1975, the Watergate Special Prosecution Force published a 277 page official Report attempting "to describe accurately and completely the policies and operations of the Watergate Special Prosecution Force from May 29, 1973 to the middle of September 1975." (p.3) Of direct relevance to the matter before the Committee is the conclusion expressed on page 11 of that Report, which represents the contemporaneous assessment of the events by the prosecutors who were directly affected by them:

> "The 'Saturday Night Massacre' did not halt the work of WSPF, and the prosecutors resumed their grand jury sessions as scheduled the following Tuesday. Bork placed Assistant Attorney General Henry Petersen, head of the Criminal Division, in charge of the investigations WSPF had been conducting. Both men assured the staff that its work would continue with the cooperation of the Justice Department and without interference from the White House." (Emphasis added.)

VIII

Both this Committee and the Senate have before them a decision of enormous consequence for the Supreme Court and the country as well as for Judge Bork. In my judgment, it would be a terrible injustice to history as well as to Judge Bork to rely on a skeptical and inaccurate misunderstanding of his motives and actions during and after the "Saturday Night Massacre," when members of the Committee and of the full Senate decide whether to advise and consent to the nomination.

I would be pleased to appear personally before the Committee to answer questions about these events. In any event, I respectfully request that this statement be included as part of the record of the hearings on the nomination.

I declare under penalties of perjury that the foregoing statement is true, to my best belief and recollection.

Washington, D. C.
September 22, 1987

Statement of Henry E. Petersen
for Submission to the
Senate Committee on the Judiciary
September 22, 1987

My name is Henry E. Petersen. I served in the Criminal Division of the Department of Justice from 1951 to 1974, and as Assistant Attorney General in that Division from 1972 to 1974. I was a participant in certain of the events of late 1973 that have been discussed in connection with the nomination of Robert H. Bork to become Associate Justice of the U.S. Supreme Court. I submit this statement to the Senate Judiciary Committee in the hope that it will assist the Committee in gaining a fuller understanding of those events.

Upon being apprised of the resignations of Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus and the dismissal of Special Prosecutor Archibald Cox, I returned to Washington, D. C. on October 20, 1973, and was present at the Department of Justice the following day. At that time, then-Acting Attorney General Bork and I discussed our mutual conviction that the Watergate Special Prosecution Force's investigations must proceed without interruption or outside interference. As the Assistant Attorney General in charge of the Criminal Division, I was given oversight responsibility for the Watergate investigations by the Acting Attorney General, who was acting pursuant to a presidential directive to return responsibility for the investigations to the Department of Justice. He and I well understood that our personal and professional reputations depended upon the proper conduct of those investigations. In our discussions on October 21, we noted the importance of keeping the Watergate Special Prosecution Force intact. This would necessarily require us to give the attorneys of the Special Prosecution Force our full support in their efforts to obtain relevant evidence.

On the evening of Monday, October 22, Acting Attorney General Bork and I met in the Solicitor General's Office with

Deputy Special Prosecutor Henry Ruth and Special Prosecution Force Counsel Philip Lacovara to discuss the status and future of the Watergate investigations. The Acting Attorney General and I conveyed to Messrs. Ruth and Lacovara our desire that they remain in their positions and continue to conduct the investigations as they had previously. Mr. Bork and I assured them that they would have our full support as the investigations went forward and that we would permit no improper interference with those investigations so long as we remained in positions of responsibility. As Mr. Ruth, a person with whom I had enjoyed a professional relationship of trust and confidence, had been Special Prosecutor Cox's Deputy, we looked to him to provide leadership and continuity to the Special Prosecution Force.

On the following day, Acting Attorney General Bork and I met with members of the Special Prosecution Force at their offices and encouraged them similarly to continue their work on the investigations. I later met separately with the leaders of the various task forces assembled by Special Prosecutor Cox and received general reports on the status of their investigations. The task force leaders were asked to continue their work, and each agreed to do so.

The Watergate investigations proceeded under Mr. Ruth's leadership, with the support of Acting Attorney General Bork and me, and without interference from the White House, until the new Special Prosecutor, Leon Jaworski, assumed office on November 1, 1973. To my knowledge, no request or proposal by Mr. Ruth or any other person on behalf of the Watergate Special Prosecution Force was denied by the Acting Attorney General or by me during this period.

Acting Attorney General Bork's intention to see that the Watergate Special Prosecution Force's investigations continued with full support from the Department of Justice and without any impediment or interference was clear from my earliest contacts with him following the dismissal of Mr. Cox. To my knowledge, he acted at all times in a manner consistent with this intention.

I would be pleased to respond to any written questions that the Committee may wish to submit to me.

I declare that the foregoing is true and accurate to the best of my knowledge, information and belief.

Henry E. Petersen

Henry E. Petersen

AFFIDAVIT OF RALPH K. WINTER

Ralph K. Winter, first having been duly sworn, deposes and says:

I am over eighteen years of age and believe in the obligation of an oath. I presently reside at 84 Maplevale Drive, Woodbridge, Connecticut.

On Friday, October 19, 1973, I traveled with my wife and son to a motel in or near McLean, Virginia. I was scheduled to fly to western Virginia the next day to deliver a speech, while my wife and son were going to spend the day with Mrs. Bork. On the morning of October 20, Mr. Bork told my wife that he intended to go to work for a while and to come home at lunchtime to watch a football game on television. My wife and son then went to the Washington Zoo with Mrs. Bork and one or more of the Bork children. When I returned in the late afternoon or early evening, I went to the Bork home in McLean. Mrs. Bork told me that there was a terrible crisis involving Mr. Bork. Messrs. Richardson and Ruckelshaus had resigned rather than carry out a presidential order to discharge the Watergate special prosecutor, Archibald Cox. Mr. Bork had automatically become Acting Attorney General as a result of the resignations and had agreed to carry out the order.

Sometime thereafter, Mr. Bork returned home. It was clear that he and his wife regarded his carrying out of the presidential order as an act that would inevitably have serious, if not disastrous, consequences for him. Mr. Bork told me that he had complied with the order because he felt, after conversations with Messrs. Richardson and Ruckelshaus, that if he did not carry out the order to discharge Cox, the Department of Justice would be left leaderless. He said that he, unlike Messrs. Richardson and Ruckelshaus, was not under a pledge to the Senate not to discharge the special prosecutor. He said that he did not believe that the President's order was unlawful because the discharge of the special prosecutor alone was not an obstruction of justice. He said that President Nixon had directed him to continue the Watergate investigations and that he, Nixon, wanted a "prosecution, not a persecution," or words to that effect.

Mr. Bork indicated to me that he intended to continue the Watergate investigation. My recollection is that during the evening a television commentator raised the question of whether the special prosecutor's staff would be dismantled and that Mr. Bork had indicated that that was out of the question. He said that in light of the staff's expertise in the matter, it seemed the only appropriate group to continue the investigation.

On the evening of October 21, 1973, there was a dinner party at the Bork house that had been planned some time before. Before dinner there was a conversation between Mr. Bork, Mr. William J. Baroody, Sr., and myself. Mr. Baroody asked Mr. Bork what he intended to do with regard to the Watergate investigation. Mr. Bork responded that he intended to continue the investigation through the Watergate special prosecutor's staff. Mr. Baroody indicated that he believed pursuit of the Presidential tapes was a partisan fishing expedition and said to Mr. Bork, "You don't have to go after the tapes," or words to that effect. Mr. Bork replied "I have to, if they are relevant to the criminal investigation," or words to that effect. My recollection is that Mr. Baroody then said something to the effect that the tapes might not be essential, and Mr. Bork indicated that that was a matter to be determined by those carrying out the investigation.

Dated at New Haven, Connecticut, this 25th day of September, 1987.

RALPH K. WINTER

Subscribed and sworn to, before me, this 25th day of September, 1987.

COMMISSIONER OF THE SUPERIOR COURT

Senator **Hatch**. Now, these three documents relate to the Watergate issue and I think deserve the Senate's attention. Now, Mr. Lacovara and Mr. Peterson were also personal participants in the events regarding Judge Bork at the time, and in their statements, I think they should be considered part of the total relevant information. I think both of you would agree with that.

Mr. **Ruth**. I agree, Senator.

Mr. **Frampton**. I agree, Senator.

Senator **Hatch**. All right. In particular, Mr. Lacovara points out that Mr. Bork's motives were not, and I will underline that, were not based on the "firestorm" that developed in the days following the dismissal of Mr. Cox. Mr. Lacovara states that he "was there and it is unfair and inaccurate to insinuate that Judge Bork has shaded his testimony." In addition, Mr. Lacovara states "I specifically recall the assurances that he and Assistant Attorney General Peterson gave that the investigations would proceed on an objective, thorough and professional basis and would seek whatever evidence was relevant in determining guilt or innocence of the persons under investigation."

Senator **Kennedy**. Can I ask the Senator for copies of what the Senator is reading from?

Senator **Hatch**. Sure.

Senator **Kennedy**. Or just ask the staff to make copies.

Senator **Hatch**. Yes. Just to have staff to make copies. They are right here. You have got copies? Okay.

Now Mr. Lacovara was there at the time, and he stated that Judge Bork, quote, "would seek whatever evidence was relevant in determining guilt or innocence."

Now I also have a New York Times, Monday, October 29, 1973 article, which made it very clear that Bork and the White House had difficulties, that he was arguing with them over the special prosecutor.

And it said, "Mr. Bork"—I am just reading excerpts, and I will put this in the record, also, if I can, Mr. Chairman.

Mr. Bork, on the other hand, had let it be known that he believed, strongly, that whoever takes a job from which Mr. Cox was dismissed a week ago, quote, "ought not to have any strings on him from anybody," unquote, and you can go on and read the rest of it. There are other good quotes in there as well.

Then we have the testimony of Dallin Oaks.

Mr. **Ruth**. Senator, by October 29, I do not debate that——

Senator **Hatch**. Okay. That is 1 week later. That is hardly "not contemporaneous with."

Mr. **Ruth**. Sir, I am not arguing. I am just stating what happened during those 9 days.

Senator **Hatch**. All right. Well, on Monday morning——

Mr. **Ruth**. I am not stating a position, I am not arguing, I am not——

Senator **Hatch**. Well, that is good.

Mr. **Ruth** [continuing]. Trying to impugn anyone's motives. I am telling you what happened, and I just do not want history rewritten merely to have somebody confirmed to the judiciary.

Senator **Hatch**. All right. If that is what you are doing, I accept that.

But on Monday morning, according to Dallin Oaks—and I do not know a person alive—but I am sure Senator Metzenbaum did not mean to impugn him. I do not think he was here when Professor Oaks testified.

But I do not know a person alive who would impugn his integrity. He said on Monday morning, to the best of his recollection, within a few hours after the dismissal, Bork called him and said that I've got a lot of problems here, and I've got to appoint a Special Prosecutor, and I want to know who you recommend. I think it's got to be somebody who's a former president of the Bar Association, somebody so impeccable that it'd be acceptable.

And he asked him who he would recommend, and he said there are only two that I would really recommend, or basically, that is what he said.

And he said Mr. Justice Powell would be one, and of course the other would be Leon Jaworski, who would have the dedication, the drive, and the tenacity to do something like this.

And he said, well, I've heard that from a number of sources, or words to that effect. Now that is all I am saying, and, he was calling from the Supreme Court rather than from the Justice Department because he was concerned about the maelstrom that was around him at that time.

And I imagine that he probably did keep it pretty close to his vest at that particular time, but certainly, a strong indication by an impeccable person, who is now an apostle in the Church of Jesus Christ of Latter Day Saints—one of the top 12 authorities in that church—that literally, Bork not only had it on his mind but was actively seeking for somebody to appoint a Special Prosecutor.

Mr. Ruth. Sir, I can tell you, as a matter of personal observation, that during those few days, Bob Bork was a very troubled person.

Senator Hatch. That is what Mr. Oaks said.

Mr. Ruth. He was being painted as a villain. There were buttons that said: "Bork twice if you're for impeachment."

He was painted as interfering with and obstructing justice, and I have no doubt that he was calling every friend he could think of, trying to figure out what to do. I would not dispute that.

Senator Hatch. Well, then, you would not deny——

Mr. Ruth. I also know he does not believe in Special Prosecutors, and he does believe, as he testified before Senator Thurmond in 1973, that there are too many constitutional problems with a Special Prosecutor.

Senator Hatch. That may be personally, but you do not doubt Dallin Oaks' testimony, do you?

Mr. Ruth. No, sir. Dallin Oaks——

Senator Hatch. Okay. So he may disbelieve in Special Prosecutors personally, but politically knew he had to have a Special Prosecutor, and actually went out and did that.

Mr. Ruth. I think eventually——

Senator Hatch. And fought the White House in the process.

Mr. Ruth. I agree with your word, that politically, he realized he had to have a Special Prosecutor.

Senator Hatch. I think that is probably so, and there are constitutional questions about whether or not Special Prosecutors, the way the law is written, whether it is constitutional.

But the fact is he was actively searching for one, and you admit you would not deny Dallin Oaks' testimony.

Mr. RUTH. Senator, I have no doubts about the constitutionality of the present Special Prosecutor.

Senator HATCH. Well, that is your viewpoint. He may have some doubts. Maybe others do, including myself, but you are certainly entitled to your viewpoint, and I suspect the other people are as well.

Mr. RUTH. Yes, sir.

Senator HATCH. And it has been a big debated subject for years. And you may very well be right.

Now Mr. Ruth, as you know, some have tried to find something sinister in differing recollections of what was said, implicitly or explicitly.

Mr. RUTH. I have said nothing about anyone being sinister.

Senator LEAHY. I am sorry. I did not hear the last comment.

Mr. RUTH. I have said nothing about anyone being sinister. I just do not believe people were sinister, except in the White House, sir.

Senator HATCH. Well, I am happy to hear that, and I think you may have agreement from me on that.

Senator KENNEDY. Senator, I want to be accommodating just in terms of the time on it, but whatever way you want to proceed. We all have been somewhat flexible, and we want to provide you with the opportunity, if you can do it, and then move on along.

Senator HATCH. I think maybe this is important. I remember—yes, I know you will, and you have always been accommodating.

Senator KENNEDY. Why don't you take——

Senator HATCH. Let me just take a few more minutes, and I will try and finish, but as you know, this is not easy to go through and you cannot do it in 5 minutes.

But it is important, and I, of course, waited for you for 20 minutes this morning as you interrogated a witness about Watergate.

Mr. RUTH. Senator, remember, we are a gasping cadaver.

Senator HATCH. You are what?

Mr. RUTH. We are a gasping cadaver, according to Senator Simpson.

Senator HATCH. That may be. That may be.

Well, the point is that there are a lot of different recollections about that Monday night meeting attended by you, Mr. Bork, Mr. Petersen, Mr. Lacovara. Let me just ask a couple of questions to see if we cannot show—you know—this canard for what it is.

First, let me read you what Mr. Petersen has said in a statement he has forwarded to this committee.

Quote. First quote. "The Acting Attorney General and I conveyed to Messrs. Ruth and Lacovara our desire that they remain in their positions and continue to conduct the investigations as they had previously."

"Mr. Bork and I assured them that they would have our full support as the investigations went forward, and that we would permit no improper interference with those investigations so long as we remained in positions of responsibility." Unquote.

You do not have any disagreement with that, do you?

Mr. RUTH. Whose testimony is that?

Senator HATCH. This is Petersen. Mr. Petersen.

Mr. RUTH. Well, I called Mr. Petersen about 2 weeks ago to check my own recollection, because he is an old friend of mine, and I said, Henry, I was just looking at Mr. Bork's 1982 confirmation testimony, and I do not recollect being assured of independence and of these being a new Special Prosecutor, but I wanted to check it against his recollection.

And I do not want to misquote him, but his recollection was that nobody knew what was going to happen. Indeed, on Tuesday or Wednesday at the time, he told me the White House still wanted me fired.

And I said, well, am I going? and he said, I do not know. That is the way it was, Senator. We cannot rewrite that history. There is nothing sinister about it, but it is all fact. It was there. There was tremendous uncertainty and no one knew what was going to happen.

Senator HATCH. I agree. No one knew what the White House was doing, but Bork was doing everything to hold the office together, and that is the point that I think Bork makes, and that is what Oaks makes, that is what Petersen makes.

Well, let me read you what Mr. Lacovara said in his statement.

Quote. "Despite some suggestions by others to the contrary, Mr. Bork reiterated that night his commitment to full and vigorous investigations, as long as he remained Acting Attorney General. I specifically recall the assurances that he and Assistant Attorney General Petersen gave, that the investigations would proceed on an objective, thorough and professional basis, and would seek whatever evidence was relevant in determining guilt or innocence of the persons under investigation."

Now none of the four people, including yourself, meeting in the Solicitor General's office that evening, knew precisely what was going to happen next, and both Mr. Bork and Mr. Petersen, it seemed to me—well, excuse me. Let me just read this.

"And both Mr. Bork and Mr. Petersen urged Henry Ruth, and me, to do whatever we could to keep the staff together and to remain at our posts as well."

"We left for later discussion the determination of precisely what investigative methods to use in pursing the investigations." Unquote.

Now that was Lacovara.

Senator KENNEDY. Give the witnesses a chance. That is the second——

Senator HATCH. I will. Do you have any——

Senator KENNEDY. Just to make a comment, if they so wish.

Mr. RUTH. Well, I do. We were certainly urged——

Senator HATCH. Well, let me finish my statement. I am just reading the quote.

Senator KENNEDY. Well, the time. We have had two rounds for the Senator, and I wanted just to go to Senator——

Senator HATCH. Ted, let's be fair. You took 20 minutes this morning on a little point. These are big points and I cannot get through them in——

Senator KENNEDY. Yes, you can.

Senator METZENBAUM. I am going to have to object myself. When Senator Thurmond——

Senator **Hatch**. It is all right for your side to take all you want. We cannot take ours?

Senator **Metzenbaum**. Just a moment. Just let me be heard.

When Senator Thurmond had the floor, you took 5 or 10 minutes of his time, and nobody objected to it. Then you have had 5 minutes, and another 5.

Senator **Kennedy**. Senator, we——

Senator **Hatch**. There were 30 minutes taken by two of your side this morning. Now all I am going to do is finish with this quote——

Senator **Kennedy**. Senator Thurmond was enormously accommodating to work out back-to-back panels.

Senator **Hatch**. Yes. He was.

Senator **Kennedy**. And he did that in order to accommodate Senator Metzenbaum and myself. We would like to try and be accommodating, but I thought that since the Senator had two rounds, that we would enforce the time limit strictly for the remaining witnesses, and then Senator Biden has come back——

Senator **Hatch**. That will be fine.

Senator **Kennedy** [continuing]. And we will let him make the decisions as to what we will do after that. Joe, we are glad to have you back.

Senator **Hatch**. That will be fine, but I would like it to work both ways, not just all the time on that side, and none——

Senator **Kennedy**. Now Senator, it has.

Senator **Hatch**. No, it has not.

Senator **Kennedy**. You have had two rounds. We will let Senator Biden——

Senator **Hatch**. Well, it has not worked that way.

Senator **Kennedy**. I would recognize the Senator from Vermont.

Senator **Leahy**. I do not mind so much the Senator from Utah going overtime. I would just like to allow the witnesses to answer his question, after he had asked it, before I begin my round. Mr. Chairman, I did not know whether they had had an opportunity to answer the question.

Senator **Hatch**. Well, first of all, I had not had the opportunity to finish the quote from Philip Lacovara, and as soon as I had finished, I was going to ask them if they agreed with the quote. I was not even permitted to do that.

Now, look, this is important stuff.

Senator **Leahy**. I thought after 10 minutes one could get the question out, but——

Senator **Hatch**. Well, let's be fair about it. Let's let both sides have some time.

Senator **Leahy**. All right.

The **Chairman**. Are you guys all right? Are you all doing okay? Good. I am all right. You are all right. I am sure glad I came back.

Mr. **Ruth**. I would be happy to ask the question and then answer it, Senator, if you want.

The question seems to be, do I agree with Phil Lacovara, that Robert Bork asked the staff to stay together and continue our work. Yes. The answer to that is "yes."

The question is why, and what would the power be when it came time to subpoena the next tape from the President and the President said no. We did not know what Mr. Bork would do when the President said no. That was the issue, sir.

Staying together—everybody wanted us to stay together for their different motives. The White House wanted us to stay together to offset the independent Special Prosecutor bills introduced in the Congress, which Mr. Bork thought were unconstitutional.

Senator HATCH. Can I just make one comment on that, because that is what Lacovara said. He said yes, he would keep you together.

But Lacovara said: "I specifically recall the assurances that he and Assistant Attorney General Petersen gave, that the investigations would proceed on an objective, thorough, and professional basis, and would seek whatever evidence was relevant in determining guilt or innocence of the persons under investigation."

Do you recall that? I mean, is that fair?

Mr. RUTH. Yes, sir. Phil Lacovara is a close friend of mine, he is one of the best lawyers——

Senator HATCH. He is a great guy.

Mr. RUTH [continuing]. I have ever dealt with. However, he and I differ on this point.

Senator HATCH. Okay.

Mr. RUTH. Mr. Bork had never been in law enforcement. He had no idea of the status of the investigations. Any assurance by him, again, was irrelevant. That is a fact, Senator. It is not sinister.

The CHAIRMAN. Hit that timer and——

Senator LEAHY. My time now?

The CHAIRMAN. Senator—your time is up?

Senator LEAHY. No. [Laughter.]

The CHAIRMAN. It is okay by me, if you view it that way.

Senator LEAHY. No, I do not.

The CHAIRMAN. Go ahead. The Senator from Vermont.

Senator LEAHY. I thought we were still on Senator Hatch's third round.

Let me ask this. You said Judge Bork was not someone with a law enforcement background. I find your testimony very interesting.

I spent a third of my adult life in law enforcement as the chief law enforcement officer of my home area, and one thing that strikes me in all of this is the question of, as this change went on, of somebody coming forward and saying, hey, fellows, what have you got there? You know, what's the evidence? Should we be securing any evidence? Should we be holding on to something? Are there subpoenas that should be going out? Should we be grabbing hold of any material? And I have not heard anything about that.

Let me ask you this, Mr. Ruth. Did Judge Bork say to you what is the evidence you have here, what kind of a case do you have, what should we be holding together?

Mr. RUTH. No, sir. You mean before the firing? There was no inquiry before the firing. We started to brief Mr. Petersen in the week following the firing.

Indeed, we were so apprehensive about what was going to happen, that a number of us had rented safe-deposit boxes, and in fact, Senator Hatch, Phil Lacovara and I had a joint safe-deposit box at Riggs Bank in which we put grand-jury material, just to safeguard it.

And the following week, we went to court with the name of the Watergate Special Prosecution Force, and only Henry Petersen to seek a protective order, that no one but members of our staff, and Henry Petersen, could take material out of our office.

That did not include Mr. Bork, and that indicates how we felt about Mr. Bork at the time, not knowing his position on the extent and breadth of executive power and executive privilege.

Senator **Leahy**. Did you find it unusual that there was no inquiry made about what kind of evidence you had, or what you were doing to protect the evidence?

Mr. **Ruth**. Before the firing, as a prosecutor, I was astounded, particularly in light of the fact that John Dean had just pleaded guilty to conspiracy to obstruct justice in conversations with the President, to which he had testified in public in July for 4 days.

So everybody knew the nature of that evidence, Senator, which was being suppressed by the firing.

Senator **Leahy**. Mr. Frampton, did you want to add anything to that?

Mr. **Frampton**. Only this, Senator. That I recall during the 2 weeks after the firing of Mr. Cox, that our offices, which had originally been seized by FBI agents, presumably acting under the instructions of Judge Bork, and were replaced by U.S. marshals, inspected the material that we took out of the office to take to the grand jury.

And so we adopted a practice of not taking anything that we would not want the White House to see, because we assumed that the marshals reported to the Justice Department, and there was a risk that anything they inspected, they might report back to the White House and to people who were under investigation.

Senator **Leahy**. Were you given, at the time, any instructions of what you were supposed to do, other than just remain on the job?

Mr. **Frampton**. Not that I can recall. Our objective was simply to try to get by, day by day, enough days, that either the President would be forced, as he was eventually, to appoint a new Special Prosecutor, or the Congress would come to our rescue with Special Prosecutor legislation, and we would have someone, even if it were not our group, to turn the evidence over to.

Mr. **Ruth**. There was a third option, Senator, which we were prepared to do, and that was to go to Judge Sirica, since we were officers of the grand jury, and become the attorneys for the grand jury.

This investigation was not going to stop.

Senator **Leahy**. All of these, these three options that you talk about, in my mind as a former prosecutor, I find remarkable, because they sort of have you going off, trying to gerrymander something, without having the person—who should be the central person giving direction—doing so.

Or am I missing something?

Mr. **Ruth**. Sir, the context—if we remind ourselves—a Mideast war had just begun in the beginning of October, and during that weekend, and before, Charles Allen Wright, the President's counsel had told Archie Cox, "We'll do what is best for the interests of the country," and General Haig had told Bill Ruckelshaus your commander-in-chief has ordered you.

There was a whole national security overtone, that it was necessary to the nation to get rid of the Watergate Special Prosecution Force.

We were, quite frankly, frightened what was going to happen, and then when the FBI occupied our offices, it is very vivid and hard to describe.

Senator **Leahy**. And the FBI was under the final chain of command to the new Acting Attorney General?

Mr. **Ruth**. Nothing goes in, nothing goes out, the FBI kept saying.

Senator **Leahy**. Thank you.

The **Chairman**. When I last was here—I am not sure who was next.

Senator Simpson.

Senator **Simpson**. Thank you, Senator. We are talking about two rounds, three rounds. I haven't heard that since I was in the Blue Ribbon Bar in Meeteetse. [Laughter.]

Strange things done in the midnight sun. Robert Service's marvelous story about the cremation of Sam McGee. And you know, really, it is strange. Because here we are talking about a situation that happened in this United States 14 years ago, and this man has been before us twice, once as a Democratically controlled Senate, once as a Republican controlled Senate, and my question is where were you then?

Mr. **Ruth**. When, Senator?

Senator **Simpson**. When we confirmed this man as Solicitor General of the United States of America before a Democratically controlled Senate and when we confirmed him to the U.S. district court of appeals, and he had a hearing before this body, and one of the issues was Watergate, and where were you then?

Mr. **Frampton**. Senator, I can answer that question for myself.

Senator **Simpson**. Yes. It would be helpful.

Mr. **Frampton**. I was not asked to testify at Judge Bork's confirmation hearings in 1982, and I didn't volunteer. I didn't volunteer to testify here today, either. I was asked to testify, and I must say that until 5 or 6 weeks ago I had never seen or read Judge Bork's testimony given in the 1982 hearings. And when I read that testimony, I concluded based upon the facts known to me personally, which are very vivid in my mind, that that testimony is substantially inaccurate.

Senator **Simpson**. Who asked you to testify?

Mr. **Frampton**. I was notified on Monday morning that the committee had put me on a witness list. That is a week ago, when I got back from Montana.

Senator **Simpson**. Who called you?

Mr. **Frampton**. I don't know, Senator. The scheduling person for the committee majority, I assume, called me and left a message that I was to testify Thursday with Mr. Ruth.

Senator **Simpson**. Were you called, too, Mr. Ruth?

Mr. **Ruth**. No, sir, not in 1982. All in all, I would rather be in Philadelphia, and that is where I was in 1982 and I am not sure I was even aware of Judge Bork's hearings.

Senator **Simpson**. Well, you are aware of Watergate because you both——

Mr. **Ruth**. Up in Philadelphia, we have to work for a living, Senator. We can't keep coming down here.

Senator **Simpson**. I know. But you both have talked about it, you have written about it, and you have said a lot about it. It meant a great deal to you in your lives.

Mr. **Ruth**. I have written nothing about it and not talked about it. I never wrote a book about Watergate. We put out a report at the end of the Watergate Special Prosecution Force, which contains most of the facts that I testified to today.

Senator **Simpson**. Well, that is pretty vital stuff anyway in your lives or you wouldn't be here and speaking about it with the intensity that I think I hear displayed.

Mr. **Ruth**. It was an intense time, Senator.

Senator **Simpson**. But, anyway, Mr. Frampton wrote about it in a book called *Stonewall*, and in chapter 8, called "Archie's Orphans Meets the Silver Fox, Jaworski Arrives:"

"To say that we had very little confidence in our new boss, Leon Jaworski, on the day he was sworn in would be putting it mildly. To us Jaworski represented no less than the man President Nixon had procured to perpetrate the biggest fix of all time."

Well, I guess you were wrong on Jaworski, apparently. What is your view on that? I think you were wrong on Jaworski. This is what you said about him.

Mr. **Frampton**. That was the point of view of most of the people in the office, including myself, on the day Jaworski arrived. That is correct, Senator. He certainly earned our respect and our admiration for his integrity and his aggressiveness.

Mr. **Ruth**. That was not my view at the time, Senator. I had had the opportunity to work with Mr. Jaworski on President Johnson's Crime Commission.

Senator **Simpson**. Yes, I see.

Mr. **Ruth**. Mr. Jaworski was tough as nails. He wasn't going to accept the job unless he knew he had independence, and when he accepted it I knew we were home free.

Senator **Simpson**. But at that time, it seems to me, if you can refer to Jaworski as a "fixture," there is no limit to what you can refer to Bork as during those times. That is what I am saying.

And Bork did testify, Elliot Richardson did testify, I don't believe you were present at the meeting of Judge Bork, either one of you, or the leaders of the team. I don't remember that you were there. No one has ever testified in these proceedings that either one of you were involved in the decision on October 20 about whether to carry out the President's order to dismiss Mr. Cox, so you are not in any possible position, either one of you, as lawyers or laymen or just witnesses, to second guess the judgment made by Judge Bork and Elliot Richardson that it was the proper course of conduct for Judge Bork to carry out that order.

How can either one of you be any kind of credible witness when you weren't there and you didn't participate in it one whit?

Mr. **Ruth**. Because Mr. Bork has testified that he made the decision in 5 minutes without asking about the state of the evidence at a time when we were requesting tapes with evidence of Presidential crime on it. I think I am entitled to make that judgment, as the number two man in the office at that time, better than anyone else.

Senator SIMPSON. Well, that is interesting. You talked about the report.

Mr. RUTH. Yes, sir.

Senator SIMPSON. You did talk about that.

Mr. RUTH. Yes, sir.

Senator SIMPSON. And in that report—and thank you, Mr. Chairman, for this extra moment here on my only round, because I am leaving here in a minute.

So here is the conclusion on page 11 of the report, the contemporaneous assessment of the events by the prosecutors:

"The Saturday Night Massacre did not halt the work of WSPF and the prosecutors resumed their grand jury sessions as scheduled the following Tuesday. Bork placed Assistant Attorney General Henry Peterson, head of the Criminal Division, in charge of the investigations WSPF had been conducting. Both men assured the staff that its work would continue with the cooperation of the Justice Department and without interference from the White House."

That is the Watergate report that you were involved in.

Mr. RUTH. Read the last sentence of that paragraph, Senator.

Senator SIMPSON. I just did. I don't want to waste too much more of my time.

Mr. RUTH. No, the last sentence.

Senator SIMPSON. The last sentence——

Mr. RUTH. I have it here if you want me to read it to you.

Senator SIMPSON. Well, whip her out, put her in the record. Everybody else is using pieces that are most acceptable to them. No reason why you can't.

But that is the report, and put that in the record, too. But you weren't there, you didn't participate, you weren't here when this critical thing came up before, and now you are here today, and were asked to do it.

Mr. RUTH. I don't understand anything you are saying, Senator.

Senator SIMPSON. I know you may not understand. I know it is puzzling for you. I know it must be absolutely baffling for you.

Mr. RUTH. I understand your dismay over these hearings, but what you said is something—let me read the last sentence.

Senator SIMPSON. What is it?

Mr. RUTH. Could I read the last sentence of that paragraph?

Senator SIMPSON. Well, you betcha.

Mr. RUTH. "Despite their anger over Cox's dismissal and their doubts about the future of their office, the staff members in a series of meetings decided to continue their work for the time being."

That is the way it was, Senator.

Senator SIMPSON. Well, that is not too dramatic.

Mr. RUTH. I am not trying to be dramatic.

Senator SIMPSON. Well, what was dramatic is that Watergate got all solved. That is what was dramatic. And to thrash around in it like we have been doing when something happened 14 years ago is the most bizarre exercise in reconstruction of something that was resolved in the American, gut and head, about 14 years ago, and that is what I am saying.

Mr. RUTH. Senator, I was invited to be here. If you would like me to go home, I will go home.

The CHAIRMAN. Senator Grassley.

Senator GRASSLEY. Mr. Chairman, I would like to reserve my time for now. Thank you.

The CHAIRMAN. Good. All right.

Senator Humphrey.

Senator HUMPHREY. Mr. Chairman, a lot of people have been referring to various documents, I would refer the curious to the transcript of the committee hearing on January 27, 1982, at which Robert Bork and was queried by members of the committee.

As Senator Simpson has pointed out, the subject of Watergate and the firing of Archibald Cox came up during that confirmation hearing. It is interesting if you look at that record that the three principal inquisitors at this hearing, the Senators from Massachusetts, Ohio, and Vermont, did not choose in 1982 despite their now apparent concern over Robert Bork's standards of ethics and the soundness of his judgment, did not see fit in 1982 to utter one word, either in the assertive or in the interrogative, in connection with the subject of Watergate or the firing of Cox.

That is certainly peculiar. Such an intense interest today, but no interest whatever—indeed, the Senator from Ohio chose to use his time to ask the nominee about his views on antitrust legislation, a subject which is dear to the heart of the Senator from Ohio.

But it certainly is curious and revealing—"revealing," that is the word. It certainly is revealing that in 1982 these same pursuers—today's pursuers of Robert Bork chose not to ask him even one word about the Cox affair, chose not to utter one word in their statements about the Cox affair.

Now, perhaps, the Senators feel that there is a different standard of ethics which applies to nominees to the second highest courts, the circuit courts, as distinct from the Supreme Court. I would not want to defend that view. That is not my view and it is not one I would want to defend. If there is sufficient ethical conduct or sufficient question about the nominee's ethical conduct to warrant denial to one level of the federal judiciary, I would think that same standard would apply to all three. In other words, if someone isn't good enough for the Supreme Court in terms of their ethical conduct, they are not good enough even for a district court nomination, much less nomination to the second most important court, the D.C. circuit.

So I don't think it is plausible or credible for Senators to argue that there are varying levels of standards we apply to the ethical conduct depending upon which level of the federal judiciary we are talking about.

So we come back to the question of why were these questions not asked in 1982? Why do today's pursuers not ask—did they not ask Robert Bork even one question on this subject in 1982? And I think the conclusion you have to draw is self-evident—politics.

And I find it distasteful in the extreme that critics and opponents would reach back 14 years to the slime of Watergate and toss a handful of that smelly stuff at this nominee when, in fact, they didn't even—at least the Senators I mentioned, didn't even consider the matter important enough in 1982 to raise one question on this subject.

Mr. Chairman, I will close. I don't have any questions.

Mr. RUTH. Could I have a comment, Senator?

Senator HUMPHREY. Yes, after I finish, if you don't mind. I have no questions for the witnesses.

I will close this way, and do so simply by quoting Dean Guido Calabrese, of the Yale Law College—Yale Law School, from an article he published in the National Law Journal in July of this year.

"I didn't think so at the time"—speaking of Robert Bork. "I didn't think so at the time but he did a principled thing." And then in another place, speaking of Watergate and the firing of Cox—this is the punch line, I should think: "For the Senate to dwell on it is a red herring and completely wrong." Published in July of this year, and I agree with that. It is a red herring and it is pretty smelly slime to be throwing against an honorable man.

I yield back whatever time I have, if any.

The CHAIRMAN. Thank you.

Would you like to make a comment, Mr. Ruth?

Mr. RUTH. Well, I hope our stating the facts isn't regarded as smelly slime. But I think there are issues, and I don't regard it as a matter of ethics, Senator Humphrey. I suppose, 14 years ago or not, certainly two things that are important as to the Saturday night massacre and Judge Bork are his views of executive power and his views of executive privilege.

On a circuit court of appeals, he is not the final arbiter. On the U.S. Supreme Court he is the final arbiter on the extent of executive power and executive privilege, so I would regard it as a legitimate inquiry to know Judge Bork's views on those issues, and certainly without the emotional overtones that, unfortunately, these hearings have become.

The CHAIRMAN. Senator Grassley, do you wish to take your time now?

Senator GRASSLEY. No thank you, Mr. Chairman.

The CHAIRMAN. I will take no time. Would you like to take some time?

Senator LEAHY. A couple of minutes, if I could, Mr. Chairman.

This is probably only the first time I have done this in the hearing. I would note, only for the record, that it is passing strange that nobody has objected to the testimony of Watergate figures when they have been here in support of Judge Bork, and we only hear the objections to Watergate being mentioned, or aspects of it, when those testifying are opposed to Judge Bork.

But there is a big difference between thrashing around in Watergate, as has been suggested here, and just simply trying to make sure that the record is factually straight. I just want to repeat a couple of things.

Mr. Frampton, Mr. Ruth, you did not ask to testify here, did you, either one of you? You were invited?

Mr. RUTH. No, sir.

Mr. FRAMPTON. That is correct. Yes.

Mr. RUTH. We were invited.

Senator LEAHY. And I think Mr. Ruth said that, all things on balance, he would rather be in Philadelphia.

Mr. RUTH. Or in your State, Senator, where my daughter lives.

Senator LEAHY. Actually, at this time of the year——

Mr. FRAMPTON. Philadelphia.

Senator LEAHY [continuing]. Without being parochial, I think Vermont is a lot prettier. The foliage is out.

But I still go back to the first question I asked. Do you not, as experienced prosecutors, find it strange that you were not asked as to the state of your evidence, what kind of evidence you had, what direction you were going, or even given directions at the time we have discussed here? Mr. Ruth?

Mr. RUTH. Yes, sir. I was astounded.

Senator LEAHY. Mr. Frampton.

Mr. FRAMPTON. Same answer, Senator.

Senator LEAHY. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Gentlemen, I truly do appreciate you taking the time. It is not a pleasant task, but thank you for coming.

Mr. RUTH. Thank you.

Mr. FRAMPTON. Thank you, Senator.

The CHAIRMAN. Now, our next panel is a panel of distinguished law deans, and I would like to ask them to come forward: Terrance Sandalow, dean of the University of Michigan Law School; Steven Frankino, dean of the Catholic University Law School; Maurice Holland, dean of the University of Oregon Law School; Ronald Davenport, former dean of Duquesne Law School; Eugene Rostow, Professor Emeritus and former dean of the Yale Law School, and one of the most knowledgeable men in the area of arms control, among many other hats he has worn. Not to suggest the others haven't worn hats, but I know that I know of Dean Rostow's prowess; and Thomas Morgan, dean of the Emory University Law School; and Gerhard Casper, former dean of the University of Chicago Law School.

This is indeed a prestigious panel. I welcome you all here. And, gentlemen, unless you have agreed on an order—do you have a preference?

Mr. CASPER. We have, Mr. Chairman.

The CHAIRMAN. You have. Well, I will let you——

Mr. CASPER. We have chosen a neutral principle, the alphabet.

The CHAIRMAN. True to the neutral principle of the alphabet. Well, let us swear you all in first because the photographers can't miss this opportunity with this many people standing in a row with their right hand raised.

Do you swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

[A chorus of "I do."]

The CHAIRMAN. Gentlemen, it is all yours, as long as each of you stay within 5 minutes. Proceed in any way that you would like.

TESTIMONY OF A PANEL CONSISTING OF TERRANCE SANDALOW, STEVEN FRANKINO, MAURICE HOLLAND, RONALD DAVENPORT, EUGENE ROSTOW, THOMAS MORGAN, AND GERHARD CASPER

Mr. **Casper**. Mr. Chairman, I appreciate the opportunity to appear before this committee. I have jointly with Robert Mundheim written a letter to the committee, dated August 25. I ask that it be included in the record.

The **Chairman**. Without objection, it will be.

Mr. **Casper**. Thank you.

[The letter follows:]

Gerhard Casper
1111 East 60th Street
Chicago, IL 60637

Robert H. Mundheim
3400 Chestnut Street
Philadelphia, PA 19104-6204

August 25, 1987

Honorable Joseph S. Biden
Chairman, Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

We write because we are deeply concerned about the partisan political character of the debate surrounding the President's nomination of Judge Robert H. Bork as an Associate Justice of the United States Supreme Court. The Supreme Court suffers if Presidents and Senators view it as an agent for implementing particular political programs.

For this reason, the criteria for evaluating a nominee's qualifications have normally been phrased not in terms of political outlook, but in terms of merit, judgment, lack of partisanship, steadiness, uprightness, and impartiality. Members of this Committee have articulated similar criteria. You, for example, have emphasized intellectual capability, demonstrated credentials in legal practice, the capacity objectively to review questions of law and fact. Senator Metzenbaum has talked about integrity, temperament, and ability. We agree with these standards. Failure to meet them caused us recently to write the Senate Judiciary Committee to oppose the confirmation of Daniel Manion as a Judge of the Seventh Circuit Court of Appeals. Application of these standards leads us to support the nomination of Judge Bork.

We believe that Judge Bork's experience and his performance as a practicing lawyer, as a law professor at one of the country's leading law schools, as Solicitor General of the United States, and as a Judge of the United States Court of Appeals for the District of Columbia Circuit, all testify strongly to his credentials and ability. For over thirty years Judge Bork has thought deeply about many of the issues which will confront the Supreme Court, and he would bring to the Court's deliberations a rich and diverse experience.

His independence and lack of partisanship are attested to by his firm commitment, during the Watergate crisis, to the continuing investigation into wrong-doing by the Nixon Administration, including wrong-doing by President Nixon himself. Many credit Judge Bork with saving the Department of Justice from complete demoralization after the resignation of the Attorney General and the firing of the Deputy Attorney General. Judge Bork's appointment of a new Special Prosecutor and the support of his work facilitated the relatively rapid restoration of the Department's professionalism under President Ford's Attorney General, Edward Levi. Throughout this period of restoration, Judge Bork continued to serve, with distinction, as Solicitor General under Attorney General Levi.

Although we think there is no question about Judge Bork's outstanding personal qualities, it is also appropriate that the Committee be satisfied that Judge Bork's conception of the role of the judiciary is within acceptable boundaries. However, we do not believe that the Committee should set as a test adherence to any particular view of the judicial role.

In Judge Bork's case, there is a record of judicial performance. To the extent that we are familiar with his judicial record, we believe it to be a record of reasonable and certainly defensible positions. His capacity to review the law of the land objectively is confirmed by the fact that decisions of the United States Court of Appeals for the District of Columbia for which he voted have never been reversed by the Supreme Court. Judge Bork's opinions have been in the mainstream of American law and he has rarely felt it necessary to dissent from any opinion of the Court. Of course, we have our disagreements with Judge Bork, but his fairmindedness is not in question.

Throughout his career, Judge Bork has taken strong positions. The Committee must not fail to distinguish between the responsibility of the profession to criticize the work of the Supreme Court and the responsibility of an Associate Justice to carry it forward. As an academic, Judge Bork lived in an environment which encouraged the forceful mapping out of positions as a technique for developing the intense debates from which solutions to difficult problems emerge. In accord with this style, he has also modified views he has previously expressed in dramatic terms. For example, his encounter with economic theories about free markets led him, 23 years ago, to oppose the then pending Civil Rights Act of 1964 as reflecting the wrong choice between competing claims of liberty and equality. We think he was wrong in 1963 and Judge Bork has long ago acknowledged that he was wrong.

In 1973 (confirmation as Solicitor General) and in 1982 (confirmation as Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit) Judge Bork testified before this Committee. His testimony on these occasions amply demonstrates that Judge Bork fully understood that each of the positions for which he was nominated required somewhat different approaches to the important issues with which he would have to deal. In considering his ability to handle the important responsibilities of an Associate Justice of the Supreme Court, we take particular comfort from the fact that, as Solicitor General and as a Circuit Judge, Judge Bork has served with acknowledged competence and with unquestioned fidelity to the demands of the position.

We are also persuaded that Judge Bork's judicial philosophy is well within respected and widely accepted concepts of American constitutionalism. He stresses that our system of government, under the Constitution, is based on the consent of the governed and allows a majority to govern important areas of life as long as they abide by the limitations the Constitution imposes. He agrees with Justice Story that, in interpreting these limitations the first and fundamental rule is "to construe them according to the sense of the terms and the intentions of the parties." In Judge Bork's words, the judge's job is to understand the principle that the Framers were trying to protect and apply that principle in the current circumstances, circumstances which the Framers may not have foreseen.

The Framers were for majority rule, inalienable rights, stability and change, all at the same time. They attempted to reconcile these disparate aims by providing for a written Constitution sharply differentiated from ordinary legislation, with a Bill of Rights and with provisions for amendment of the Constitution by super majorities. This course had important practical implications: it provided for constitutional change by means of amendments and it advised the majority as well as governmental actors, courts included, that they had no power to regulate at will the structure of government or basic rights of individuals. As Justice Harlan wrote in 1963, the Supreme Court "no less than all other branches of government, is bound by the Constitution. The Constitution does not confer blanket authority to step into every situation where the political branches may have fallen short."

The issue is the degree of fidelity owed to the fair meaning of the Constitution and the intentions of the Framers. The issue is furthermore what significance should be attached to changes in circumstances and the evolution of constitutional doctrine. These are subtle and complex matters which cannot be disposed of by simply stressing the high level of generality to which constitutional terms such as "due process", or "equal protection" can be elevated. For example, the Fifteenth Amendment was required to protect the right to vote against discrimination on account of race and the Nineteenth Amendment was required to give the right to vote to women. Those fundamental rights were thought not to have been guaranteed under the Fourteenth Amendment. On the other hand, the Supreme Court has taken the view that it has greater latitude in questioning whether a state's regulation of social relations under the conditions in which we live may amount to a denial of constitutionally protected rights in light of the goals of the Fourteenth Amendment. Judge Bork has indicated that, as a Judge, his willingness to intervene in such cases is limited. Although we might wish that he were somewhat more willing to see judges act, we respect his sense that facile judicial manipulation of the Constitution endangers the very legitimacy that has been a triumphant accomplishment of American constitutionalism for the last 200 years. Judge Bork seeks to remind us that a judge is charged with interpretation of the Constitution, but has no mandate to amend it.

Judge Bork's belief that judges may not amend the Constitution does not necessarily mean that he would vote to overturn precedent with which he disagrees. Judge Bork is fully aware of the interest in legal certainty and stability. He testified before this committee in 1982 that the deference which is due the legislature is also due to "the value of precedence, and of certainty, and of continuity." Indeed, when asked about _stare decisis_ at those hearings, he was cautious about the wisdom of overturning a mistaken constitutional ruling. He said that if a court was _convinced_ it had made a _terrible_ mistake, it should _ultimately_ correct it.

Although Judge Bork's judicial philosophy leads him to be reticent about court intervention to remedy legislative malfunctions, his philosophy is well within the tradition of American constitutionalism. Indeed, his emphasis that constitutional law is addressed "to the common sense of the people" focuses on an essential condition for preserving the values we cherish in our society.

Sincerely,

Gerhard Casper

Robert H. Mundheim

cc: Members of the Senate Judiciary Committee

Mr. Casper. Today, I represent only myself.

With respect to Judge Bork, I have during my professional life as a student of the Constitution sometimes agreed with Robert Bork and sometimes disagreed with him. However, I had the opportunity to get to know Judge Bork well during the 9 years I served as dean of the University of Chicago Law School. I have also taught alongside Judge Bork at the American Law and Legal Institution session of the Salzburg Seminar in American Studies in 1983. These encounters have left me greatly impressed with Judge Bork's ability, intellectual honesty and integrity.

The Bork I know is not the cartoon character which has been drawn by some of his opponents. One almost gets the impression that Judge Bork has been made the scapegoat—I use the word in the Biblical sense—for the sins this country, the Congress, Presidents, State legislatures, and judges have committed over 200 years.

As you all know, Robert Bork has been one of the most outspoken members of a profession which is not known for its reticence. If you have not been impressed, I certainly have, by his willingness forcefully to map out positions for others to criticize. What is more important, however, is Judge Bork's past and continuing readiness to consider the other side and to yield when the force of arguments and facts requires it.

His openmindedness has been most reflected in his distinguished service in the various positions he has held in his professional life, especially in his public service as Solicitor General and as a judge.

Before the hearings began, Judge Bork was criticized for not having an open mind. Then accusations emerged during the hearings that Judge Bork is too willing to adjust his views. The catchword has been "confirmation conversion." I view these accusations as most unfair and unjustified.

Under the committee's intense questioning, Judge Bork has had to think in very concrete and specific ways about the responsibilities of a Supreme Court Justice, as distinguished from those he has previously discharged. In a most forthcoming manner he has made it clear that he fully appreciates the awesome responsibilities of the Supreme Court for the continuity of American law and the contribution that briefs, argument, and collegial discussion make to the proper discharge of those responsibilities.

I turn now to what I consider the crucial issue of these hearings. The majority leader, Senator Byrd, in his opening statement to this committee, has most ably articulated the question of overriding importance before the Senate. I quote: "As we celebrate the bicentennial of the Constitution, it is entirely fitting that we discuss the allegiance to and regard for the Constitution of a person to whom we're contemplating entrusting major responsibility for its interpretation and application."

Somewhat surprisingly, Judge Bork seems to be taken to task by members of this very legislative body for reminding us that our system of government, under the Constitution, allows majorities to govern important areas of life as long as they abide by the limitations the Constitution imposes on them. As concerns the interpretation of that Constitution, the very point of having a written constitution is the faithful application and interpretation of that instrument.

To be sure, constitutional law, as all law, evolves and develops over time. Nevertheless, to live under the Constitution does not mean that anything goes as long as it is approved by five out of nine nonelected guardians assembled as the Supreme Court of the United States. We must keep in mind that judges who are free to operate as a continuing constitutional convention may, as they have done in the past, adopt doctrines that may diminish our liberties and override compassionate interventions by government.

It is my view that Judge Bork has a more profound understanding of the essential nature of American constitutionalism than has been reflected by many of his critics. Contrary to the impression created by these hearings—which have already done a great amount of harm—this country is held together by the rule of law, not by the rule of judges.

Mr. Richardson referred, this morning, to Judge Learned Hand and I may quote one sentence from the passage he quoted once again because it is very important. Judge Learned Hand once said: "[I]n a society which evades its responsibility by thrusting upon the courts the nurture of the spirit of [the moderation], that spirit in the end will perish."

It would be ironic if, in this bicentennial year, the Senate were to oppose Judge Bork because he believes, correctly, that judges, like all other government actors, are bound by the Constitution and should make its meaning the reference point of all interpretations. It would be ironic if in this bicentennial year, the Senate were to seek to legitimate a change in our form of government from one based on the rule of law and the Constitution to one based on the rule of judges who have cut their moorings to the basic charter—and who have been chosen by a highly politicized process that obscures the crucial and delicate issues involved.

I thank the members of the committee who are present for listening to me and may I add one word. I address this especially to those members of the committee who have previously announced that they have made up their mind. I very much hope that sober, second thought will prevail. Thank you very much.

[The statement of Dean Gerhard Casper follows:]

Remarks by Gerhard Casper,

William B. Graham Professor of Law,
The University of Chicago

at Confirmation Hearings for Robert H. Bork

September 29, 1987

Mr. Chairman, Members of the Committee:

I appreciate the opportunity to appear before this committee. I have, jointly with Robert Mundheim, written a letter to the committee, dated August 25. I ask that it be included in the record. Today I represent only myself.

With respect to Judge Bork, I have, during my professional life as a student of the Constitution, sometimes agreed with Robert Bork and sometimes disagreed with him. However, I have had the opportunity to get to know Judge Bork well during the nine years I served as Dean of the University of Chicago Law School. I have also taught alongside Judge Bork at the American Law and Legal Institutions session of the Salzburg Seminar in American Studies in 1983. These encounters have left me greatly impressed with Judge Bork's ability, intellectual honesty, and integrity. The Bork I know is not the cartoon character which has been drawn by some of his opponents. One almost gets the impression that Judge Bork has been made the scapegoat -- I use the word in the Biblical sense -- for the sins this country, the Congress, Presidents, state legislatures, and judges have committed over two hundred years.

As you all know, Robert Bork has been one of the most outspoken members of a profession which is not known for its reticence. If you have not been impressed, I certainly have, by his willingness forcefully to map out positions for others to criticize. What is more important, however, is Judge Bork's past and continuing readiness to consider the other side and to yield when the force of arguments and facts requires it. His openmindedness has been most reflected in his distinguished service in the various positions he has held in his professional life, especially in his public service as Solicitor General and as a judge.

Before the hearings began, Judge Bork was criticized for not having an open mind. Then accusations emerged during the hearings that Judge Bork is too willing to adjust his views -- the catchword has been "confirmation conversion." I view these accusations as most unfair and unjustified.

Under the committee's intense questioning, Judge Bork has had to think in very concrete and specific ways about the responsibilities of a Supreme Court Justice, as distinguished from those he has previously discharged. In a most forthcoming manner he has made it clear that he fully appreciates the awesome responsibilities of the Supreme Court for the continuity of American law and the contribution that briefs, argument, and collegial discussion make to the proper discharge of those responsibilities.

I turn now to what I consider the crucial issue of these hearings. The majority leader, Senator Byrd, in his opening statement to this committee, has most ably articulated the question of overriding importance before this committee and the Senate. I quote: "As we celebrate the bicentennial of the Constitution, it is entirely fitting that we discuss the allegiance to and regard for the Constitution of a person to whom we're contemplating entrusting major responsibility for its interpretation and application."

Somewhat surprisingly, Judge Bork seems to be taken to task by members of this very legislative body for reminding us that our system of government, under the Constitution, allows majorities to govern important areas of life as long as they abide by the limitations the Constitution imposes on them. As concerns the interpretation of that Constitution, the very point of having a constitution is the faithful application and interpretation of that instrument.

To be sure, constitutional law, as all law, evolves and develops over time. Nevertheless, to live under the Constitution does not mean that anything goes as long as it is approved by five out of nine nonelected guardians assembled as the Supreme Court of the United States. We must keep in mind that judges who are free to operate as a continuing constitutional convention may, as they have done in the past, adopt doctrines that may diminish our liberties and override compassionate interventions by government.

It is my view that Judge Bork has a more profound understanding of the essential nature of American constitutionalism than has been reflected by many of his critics. Contrary to the impression created by these hearings -- which have already done a great amount of harm -- this country is held together by the rule of law, not by the rule of judges. As Judge Learned Hand once said: "[I]n a society which evades its responsibility by thrusting upon the courts the nurture of [the spirit of moderation], that spirit in the end will perish."

It would be ironic if, in this bicentennial year, the Senate were to oppose Judge Bork because he believes, correctly, that judges, like all other government actors, are bound by the Constitution and should make its meaning the [illegible] starting point of all interpretations. It would be ironic if in this bicentennial year, the Senate were to seek to legitimate a change in our form of government from one based on the rule of law and the Constitution to one based on the rule of judges who have cut their moorings to the basic charter -- and who have been chosen by a highly politicized process that obscures the crucial and delicate issues involved.

The CHAIRMAN. Thank you.
Dean Davenport.

TESTIMONY OF RONALD R. DAVENPORT

Mr. DAVENPORT. Yes, I am next. I want to second what Dean Casper has said. I have a statement I think all of you have, which I would like to have admitted for the record.

The CHAIRMAN. Without objection, it will be placed in the record.

Mr. DAVENPORT. And so that things might move along because seven deans—that is a lot of deans—I will summarize what I have to say, Mr. Chairman.

The CHAIRMAN. Appreciate it.

Mr. DAVENPORT. I have known Judge Bork for 25 years. I was a student of his in New Haven and, at that time, I had many opportunities to discuss with him the issues of that day. I found him an open, energetic and balanced man. Over the past 25 years, we have had a number of professional associations. I think he is a bright man and able scholar and is brilliant in his approach. I taught constitutional law at Duquesne for 13 years and one of the things I said to my students was, that keep in mind that no matter what your philosophy, no matter how liberal or how conservative, at least one-half the time, the people that you did not trust would be in power.

And that as we gave meaning to those words in the Constitution, that we should be sensitive to that fact. I have debated the issues about which Judge Bork has been criticized. I taught and was dean at a Catholic institution and at that institution, one of our most important persons was St. Thomas Aquinas. I believe that I paraphrase him when I say that he said, if you were to persuade a man as to the justness of your cause, you must first go to where he is and bring him to you. Too often in our society, we talk at each other and not to each other. I believe that the questions that Judge Bork raised in the course of his work over the past 25 years were things that other people thought.

Judge Bork wrote and spoke what other people thought and by bringing them out, we could have an honest dialogue so that we can move this society forward. Now, I have not always agreed with Judge Bork and what he said and, frankly, I would be hard pressed to find someone with whom I did agree all the time, but I can say that he brings to my experience with him and his experience as a judge, an honesty and integrity and an openmindedness.

Finally, Mr. Chairman, 16 years ago, I was approached to comment on the selection of two men for the Supreme Court. I said at that time that the most important consideration is honesty and integrity. That if a person were honest and open, that you had an opportunity to persuade him or her as to the correctness of your ideas. I believe that Judge Bork does bring that to the table. At that time—some 16 years ago—I was not as convinced about one person and I said so at that time.

I would say, in closing, that it is very important that the dialogue we have had, as a country, be kept at a level where we can effectively make judgments as to the honesty, competence and quality of the men or women that we would place on our Supreme Court. Thank you.

[Prepared statement follows:]

PREPARED STATEMENT OF RONALD R. DAVENPORT

I have known Judge Bork for over 25 years. As a graduate student at the Yale Law School, I took his course in Antitrust Law. This was Judge Bork's first year at Yale and I had many opportunities to engage him in spirited debate on the issues of that time. I found him then to be open, approachable, and balanced. Over the past 25 years both in his career at Yale, his career as Solicitor General, and as a judge on the Court of Appeals for the District of Columbia, our professional relationship has continued. Several years ago, Judge Bork spent the day at Duquesne Law School and spoke to our law alumni. Judge Bork is a bright, able, and energetic scholar. He has a sharp, questioning, and demanding mind. Although I do not share all of his conclusions and approaches, I nonetheless believe that he brings to the court, not only intellectual brilliance, but an open and inquiring mind.

Judge Bork has been criticized for many things that he has written over the course of his long and distinguished career. It is my judgment that a distinction must be drawn between what a professor says and writes and what a judge does. Professors are paid to make students think, they are paid to make courts think, they are paid to ask the hard questions which sharpens the legal reasoning process. Professor Bork wrote and spoke what other people thought. Judge Bork, however, has demonstrated in his role as Judge a recognition of the difference between theorizing and judging. Judge Bork's career as a Judge and his testimony before this committee clearly reflects his respect for and commitment to stare decisis.

It is understandable that his intellectual aggressiveness, the power of his observations, and his criticisms of *Shelly* v. *Kramer,* or *Brandenburg* v. *Ohio and Bakke,* would, of course, raise questions and concerns. Too often in our public dialogue, we talk at each other not to each other. We do not reveal the underlying principles upon which we may disagree. The brilliance of Judge Bork is such that as a professor he made those of us who may or may not have shared his views think long and hard about our ideas and their acceptability in the marketplace. To paraphrase Saint Thomas Acquinas, if you would persuade a man as to the justness of your cause, you must first go to where he is and bring him to you.

Sixteen years ago I was asked by the American Bar Association's Judiciary Committee to comment on the nomination of two justices to the Supreme Court. I said at the time and would say now that a Supreme Court justice needs intellectual competence, that he or she must be personally honest, i.e., he or she should have a mind open to new ideas or new ways of looking at old ideas and, finally, in the context of that era, I suggested that a Supreme Court nominee must have an understanding of the complex forces at work in our society. More particularly, he or she must appreciate the pressures and strains our society put forward by management, by unions, by students, by blacks, by poor whites, by the disaffected and by those people who feel that society is too permissive. In short, he or she must understand all the competing forces that were then and now at work. In addition, I stated at that time it did not matter whether or not the nominee were a liberal or a conservative. That, in my judgment, was and continues to be an irrelative question. It was then and it is now sufficient that the person be intellectually honest and open to new ideas.

Over the 13 years that I had occasion to teach Constitutional Law at Duquesne University, I tried to remind the students that no matter what their philosophy, no matter how liberal or conservative, at least one half the time the people that they did not trust would be in power. That as they attempted to give the words of the Constitution meaning they should be aware that the individual justices, the President, or the Congress may or may not in the future reflect the views and aspirations they hold dear. It was my concern then and it is my concern now that we as a people have a full understanding of the tradeoffs we make as we choose one course over the other. The question is not judicial activism or judicial restraint, but an understanding of the competing values and concerns at work in our society. That we are mindful in the words of Justice Felix Frankfurter "the power of the court is neither of the person or of the sword but moral suasion."

I am confident that if Judge Bork is confirmed, he will not treat his elevation to the Supreme Court as a roving commission to rewrite the Constitution. In fact, to do so would be violence to his deep respect for the concept of judicial restraint. Judge Bork is a warm and sensitive man who, in my judgment, will bring to the Court a deep respect and concern for the rights of all citizens.

The CHAIRMAN. Thank you, Dean. Mr. Ambassador, it is good to have you here. I am tempted to ask you about the INF agreement, more than anything else.

Mr. ROSTOW. Not in those 5 minutes, Mr. Chairman.

The CHAIRMAN. No, I will not. I will refrain, but I would like the benefit of your——

Mr. CASPER. Mr. Chairman, may I remind you of the neutral principle? We were going by alphabet.

The CHAIRMAN. I beg your pardon. I was just going down the line here. I am sorry. Help me out. I guess "F" is next. Dean, welcome and I stand corrected.

Mr. FRANKINO. Mr. Chairman, if I may, I would like to correct the record. You had identified me as dean of the Catholic University Law School. I was until January. I am presently dean of the Villanova Law School in Villanova, PA.

The CHAIRMAN. I beg your pardon. Thank you for the correction. Both fine universities.

TESTIMONY OF STEVEN FRANKINO

Mr. FRANKINO. I have known Judge Bork since 1975. It is a personal pleasure for me to offer testimony in support of his confirmation. My testimony is my own and does not represent the views of any institution or persons with whom I am associated.

I can add little to the substance of the testimony of the past weeks; however, there are two perspectives I would like to emphasize: Judge Bork's impact on legal education and his reputation as a judge. Great attention has been focused on Judge Bork's speeches and lectures. What has not been emphasized is their context. After the mid-1960's, the ideological spectrum of legal education generally narrowed. Those of us who were comfortable within that perspective did not fully appreciate that some of our students, and many legal professionals, were not with us.

Judge Bork and others mounted a campaign to redress the balance. The vigor they brought to the platforms was in no small part designed to open up the law schools to under-represented ideas and values. The development of the federalist society chapters within law schools provided outlets and fora for students and faculty who wished to explore law beyond contemporary orthodoxies. This has been a significant contribution. It has encouraged the return of a full spectrum of viewpoints to legal education. If the rhetoric of Judge Bork and his colleagues was sometimes pointed, heated and even caustic, it was because the barriers to their being heard were so formidable.

The movement which they led has achieved some notable successes. New faculty are adding intellectual and ideological pluralism to our classrooms and students are exploring law from more perspectives. Judge Bork's lectures must be placed in this context. They were purposely at the cutting edge, were often tentative and exploratory, and ever-evolving. They were designed to invigorate the movement for wider dialogue. The result has been greater balance, which allows legal education to make a more valuable contribution to our nation's legal system.

In discussing the body of his scholarship as a professor, his legal briefs as Solicitor General, and his opinions as a judge, Judge Bork, in his testimony, underscored the differences in his roles. The nature of a lawyer as a scholar, an advocate, and as a judge, requires different forms of expression and different qualities of judgment and forbearance. Judge Bork's scholarship can only be fairly evaluated in light of his status at the time of the writing. They are a brilliant example of a law professor doing what he is appointed to do. They demonstrate that Judge Bork took his academic responsibility seriously.

As Professor Mary Ann Glendon of Harvard Law School has written: "Judge Bork's critics have addressed themselves primarily to the positions taken in his scholarly writings where he and they have been engaged in spirited debate over the years. Judge Bork, unlike many of his critics, is able to distinguish between the role of a professor in building theory and the role of a judge, applying practical reason to real-life situations."

During most of Judge Bork's service on the D.C. Circuit Court, I was actively involved in the legal life of the District of Columbia. My work brought me in frequent contact with lawyers who actively practiced before him. I have never heard it suggested that Judge Bork was an ideologue or a judge with an agenda. Those who practice in the Court of Appeals of the District of Columbia have praised Judge Bork's openmindedness and fairness. He has evidenced no idiosyncratic approach to the judicial function.

I have, on a number of occasions, attended lectures and speeches of Judge Bork on the nature of the judiciary. There is nothing radical or unusual in his approach. In fact, he is in accord with what I have understood to be the traditions of the common law and the positions of great American jurists. There are other approaches to the judicial function, but to characterize Judge Bork's as outside of current legal thinking is, in my opinion, simply not accurate.

The quest to predict what an appointee will do after confirmation is not a very fruitful exercise. A colleague at Villanova referred me to a 1972 American Bar Association Journal article by Senator Barry Goldwater entitled "Political Philosophy and Supreme Court Justices." It demonstrates from 12 historic precedents the futility of that quest. Rightly showing that nine of the 12 most highly regarded Supreme Court Justices, including Justices Brandeis, Hughes, and Frankfurter, would have satisfied the kind of scrutiny applied to Judge Bork. In fact, this historic perspective leads to a prediction that ten years from now, Judge Bork's present critics may well be his strongest supporters.

My personal opinion is that Judge Bork is outstanding in every respect. When the novel issues of the next decade are ready for decision, we will be fortunate to have his intellect, judgment and capacity for growth as a part of the U.S. Supreme Court. Thank you.

[Statement of Mr. Frankino follows:]

Testimony
Senate Committee on the Judiciary
September 29, 1987
Steven P. Frankino

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In discussing his body of scholarship as a professor, his legal briefs as Solicitor General and his opinions as a judge, Judge Bork in his testimony underscored the differences in his roles. The nature of the lawyer as a scholar, an advocate and as a judge requires different forms of expression and different qualities of judgment and forbearance.

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> "Judge Bork's academic critics have addressed themselves primarily to positions taken in his scholarly writings where he and they have been engaged in spirited debate over the years. But the best indication of what Robert Bork will be like as a Supreme Court Justice is the five-year career of Robert Bork as a Circuit Court judge....Judge Bork, unlike many of his critics is able to distinguish between the role of professor in building theory and the role of judge applying practical reason to real-life situations."

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My personal opinion is that Judge Bork is outstanding in every respect. When the novel issues of the next decade are ready for decision, we will be fortunate to have his intellect, judgment and capacity for growth a part of the United States Supreme Court.

Senator **Heflin**. I believe Dean Holland, you are the next, alphabetical in order.

TESTIMONY OF MAURICE HOLLAND

Mr. **Holland**. Thank you, Mr. Chairman. I would like to say at the outset that in the testimony I am about to give and in the prepared statement I previously have submitted to the committee through its chief counsel, I speak only for myself and not on behalf of any institution with which I am affiliated.

As a witness whose testimony comes near the end of these hearings, my difficulty is in finding anything to say that would not substantially repeat what others more authoritative and eloquent than I have already said in support of this distinguished nominee. On the other hand, there is perhaps one advantage in coming so late and that is, it does allow me, with the committee's indulgence, to reflect back on some of what has transpired in these proceedings and to share with the committee some thoughts that have occurred to me about what you have heard.

The nomination of Judge Bork has evoked a response, a reaction which makes it, to my mind, the most extraordinary Supreme Court nomination of modern times. At least, since the Brandeis nomination of 1916. What strikes me as nearly unique about it is not that it has proved controversial, or that political passions have become engaged, but rather, it is the extraordinary division of opinion among knowledgeable people of the highest repute and standing, people whose qualifications to speak and whose motives in doing so cannot fairly be questioned.

Consider the number, standing and qualifications of those who have appeared before you in support of this nomination. I would ask you to reflect back particularly on some of those who have appeared of surpassing stature, many of them at a stage in their careers to be beyond ambition, many of them aligned on different sides of political and economic questions from those associated with the nominee prior to his appointment to the bench.

For example, retired Chief Justice Warren Burger told you that he regarded Judge Bork as among the most eminently qualified nominees of the last 50 years and declared his judicial philosophy to be as much within the mainstream as his own. Who could possibly be a more compelling or credible witness than the jurist who has just completed 16 years service as Chief Justice of the United States? Who could better understand the inner workings of the Court and the dynamics of its internal collegiality? Who could possibly care more about the well-being of the Court or about its continuity with the work and achievements that marked his own Chief Justiceship? Who could speak more disinterestedly without the slightest imputation of ulterior motives?

The power of advice and consent is, of course, given to you Senators and not to retired Chief Justices. But I would respectfully submit that any Senator ought to think very long and hard before acting counter to the ringing endorsement of Judge Bork by Chief Justice Burger, especially so when that endorsement was seconded by as preeminent a figure as Lloyd Cutler, a lawyer whose expertise related to the Supreme Court is equalled by very few and exceeded by none in the United States, a lawyer who accounts himself a rather partisan, liberal Democrat and more to the point, a steadfast and long-standing advocate of civil rights, civil liberties, and equality under the law.

Then there were the former Attorneys General of the United States, reaching back to the Eisenhower administration, including one of the towering figures of American legal thought, former Attorney General, professor, dean, and President Edward Levi. Also, former Attorney General Griffin Bell. Is it really credible to believe that men like Edward Levi, William Rogers, William Saxbe, Griffin Bell, and William French Smith would endorse for confirmation to the Supreme Court a nominee who would, as professor Tribe prophesied, create chaos on the Supreme Court?

When such respected scholars as Dick Stewart of Harvard, Dan Meador of Virginia, Henry Monaghan of Columbia, Forrest McDonald of Alabama, and my fellow panelists here today, so enthusiastically and unreservedly support a nominee, would they do so for a nominee lacking in distinguished qualifications, including qualification by reason of judicial philosophy? Of course, many people of stature and standing and high qualifications have appeared in opposition to this nomination.

Surely such respected and knowledgeable figures as Secretary Hufstedler, Secretary Coleman, former Attorney General Katzenbach, Mayor Young, such distinguished practitioners as John Frank, Robert Meserve, academics such as Barbara Jordan, John Hope Franklin, Walter Dellinger, Philip Kurland, and Laurence Tribe—these are people who are entitled to be taken seriously as well.

Given the quality and repute of the opposing witnesses, does that not leave the matter of endorsements versus protestations pretty much of a wash, so that each Senator is left to resolve this matter without much regard to this factor?

With the greatest respect to the opposing witnesses, I would answer that it does not. My reasons for saying this derive largely from what struck me as perhaps the most useful bit of testimony submitted to this committee in the entire course of the hearings. And that was Professor Dan Meador's suggestion of some neutral principles for the guidance of the Senate's deliberations—neutral principles that are desperately needed.

Professor Meador urged that granting a nominee's character and professional competence, both of which should be assessed by rigorous standards, the Senate's concern with the matter of judicial philosophy should be limited to one of assuring itself that it is in the mainstream.

That assurance, in turn, should be tested by the Senators asking themselves the following questions:

Is confirmation of this nominee supported by a substantial array of lawyers and legal scholars who, themselves, are well regarded and come from various parts of the country and diverse legal settings?

Second, do the nominee's views about various legal topics and doctrines, and the task of interpreting the Constitution—do these have substantial support among other judges, lawyers and legal scholars?

And third, in the case of a nominee who is a lower court judge, has that lower court judge proved to be a lone wolf, an eccentric, a continual dissenter?

I suggest along with Professor Meador that the answer to those three questions are, "Yes," "Yes," and "No." That is, no, Judge Bork certainly has not been a frequent dissenter, but 95 percent of the time, as I understand the record, in the majority.

What, then, distinguishes as a group and in the aggregate, those witnesses who have appeared before you in support of this nomination from those who have testified in opposition. I do not contend that these groups differ from one another in quality, knowledge, purity of motive in offering their testimony, although I would contend that the highly commendatory testimony of Chief Justice Burger has a special, unique resonance and authoritativeness, especially as he was, himself, a jurist appointed with very specific expectations on the part of the President who nominated him, but whose steadfast independence, once on the Court, almost certainly disappointed those expectations.

What strikes me as the salient difference between these two groups comes down essentially to this: One could easily imagine many of the people who have spoken in support of this nomination also appearing a few years later strongly supportive of the nomination of a highly qualified liberal, such as Secretary Hufstedler or Professor Tribe.

One could readily imagine even more of Judge Bork's supporters, such as Attorney General Levy, William Rogers and Dan Meador, certainly not actively opposing the confirmation of a highly qualified, liberal nominee.

One cannot readily imagine those who have testified against this nomination supporting a highly qualified conservative nominee, even one who, as Lloyd Cutler described him, is a moderate conservative.

The difference between the two groups, it seems to me, is that the witnesses who have spoken in opposition have said, in effect, that Judge Bork's judicial philosophy is not the one they prefer, and they are asking this committee and the Senate to become an enforcer of that preference—an enforcer of their jurisprudential orthodoxy.

On this much-debated question of the relevance, and the concern of the Senate with judicial philosophy, it seems to me that the Senate is entirely entitled, and in fact obligated to ensure that the nominee, in addition to the qualifications of character and ability, must be in the mainstream, broadly defined.

But I would urge this committee and the Senate not to engage in fine-tuning speculation about what particular branch or species of judicial philosophy the nominee has, or try to project into the future how the nominee might vote in various alignments.

I do that because history shows the futility of that, how little can be reliably inferred for the future from the past. I urge the Senate and this committee to take very seriously the neutral principles proposed by Professor Meador, because I believe the application of such principles will be the best way to deal with this confirmation in a proper and dignified way, and to avoid an aggravation of the phenomenon noted by Dean Casper in his testimony.

Thank you, Mr. Chairman.

[Statement of Mr. Holland follows:]

PREPARED STATEMENT OF DEAN MAURICE J. HOLLAND

Submitted to the Committee on the Judiciary of the United States Senate, Hon. Joseph R. Biden, Jr., Chairman Presiding in Connection with the Hearing on the Nomination of Hon. Robert H. Bork to be an Associate Justice of the United States Supreme Court.

My name is Maurice J. Holland. I am Dean of the School of Law and Professor of Law at the University of Oregon, and live in Eugene, Oregon. This statement is submitted on my own behalf personally and not on behalf of any institution with which I am affiliated.

Opponents of Judge Bork's nomination have frequently spoken and written as though he had been nominated to become the Supreme Court of the United States. They have expressed apocalyptic fears that, if confirmed, he would single-handedly "set the clock back" and overturn decades of Supreme Court decisions. Simply in the interest of proper perspective, I think it is worth noting the obvious fact that Judge Bork has been nominated to be one of nine Justices. This means of course that his vote in any case will not determine its outcome except to the extent he succeeds by the force of his reasoning in attracting the votes of at least four other Justices to his position. I do not believe that he is anything resembling the "extremist" or "rigid ideologue" some of the opponents of his nomination have depicted, but even if he were, then for any of the dire things such opponents have forecast to actually occur, one would have to believe that at least four of the present Justices could be persuaded to concur with Judge Bork in his supposedly extremist or rigidly ideological views. This consideration is not, of course, an affirmative reason for the Senate to confirm any nominee to the Supreme Court, since any nominee would become only one of nine Justices, but simply to dispel some of the incredible hyperbole provoked by this nomination so that it can be fairly and rationally considered on its own specific merits.

Judge Bork's nomination has also provoked much debate and discussion about the proper role of the Senate in granting or withholding consent to Supreme Court nominations. On this issue I might be breaking ranks with some of the supporters of this nomination, since I believe the Senate's role to be a very substantial and important one, and that its inquiry should be considerably more searching than when screening Executive Branch appointments. This does not in the least discomfit me in supporting this nomination, as I firmly believe that Judge Bork does emphatically meet the rigorous standards the Senate should properly insist upon.

The Senate should insist that any nominee for the Supreme Court possess in high degree: first, attributes of personal character, honesty, and integrity such that both the Senate and the country can have the full confidence that he or she will if confirmed scrupulously abide by the Canons of Judicial Ethics and all other ethical constraints on judicial conduct; secondly, eminent qualifications by way of learning in the law and education, experience and distinguished attainment in the legal profession; and thirdly, a judicial philosophy and an understanding of the Constitution of the United States, the role of the Supreme Court, and the institution of judicial review that is within the quite broad bounds of respected and informed opinion on these difficult and delicate matters. With regard to the latter of these qualifications, I do not think it appropriate for the Senate to require that any nominee's judicial philosophy necessarily agree with that of a majority of its members, or that any nominee's judicial philosophy be at the center point of the aforementioned range of respected and informed opinion. For the Senate to impose a rigidly or narrowly delineated centrist standard with respect to judicial philosophy would mean that some of the greatest of Supreme Court Justices, such as Brandeis, Douglas, Black, Holmes and the present Justice Marshall might well have been denied confirmation and the country would have been the poorer for their defeats.

I shall discuss the first two of the above standards, moral integrity and professional fitness, only briefly since it seems to me that Judge Bork easily meets both of them. I am aware of nothing in the record of his private life, or in the record of his quite extensive public life, to suggest anything other than that Judge Bork has met, and as a Justice would meet, the most stringent of ethical standards of rectitude, probity, and honesty rightly demanded of a judge. He has twice been subjected to exacting background investigations entailed in appointment to high office, most recently judicial office, and has twice been unanimously confirmed to those offices by the Senate.

As to professional fitness nearly all even of his severest critics have conceded that Judge Bork fulfills that requirement in remarkably high degree. He is not merely an intelligent lawyer, but is rather one of the most accomplished and distinguished legal scholars of his generation. He was a long time member of the faculty of one of the nation's leading law schools, an author who has published prolifically and can number among his books and articles some of the most influential writings of the past three decades in the fields of constitutional and antitrust law. But he would bring to the Court far more than his extraordinary academic attainments. He has extensive experience as a practitioner, both as member of a private firm and at the summit of legal practice as Solicitor General of the United States. Finally, for the past five years, he has been a judge of the court which many rank second in importance and in the challenge of its docket to the Supreme Court, the Court of Appeals for the District of Columbia Circuit. In fact, leaving aside for the moment the matter of judicial philosophy with which I shall next deal, Judge Bork would seem to be not merely a highly qualified nominee, but to closely approximate the absolute ideal of what a Supreme Court nominee ought to be.

But, as everyone knows, it is precisely judicial philosophy that is the rub, or as it is sometimes put, "ideology" or "political views." "Ideology" seems to have become little more than a promiscuously used epithet to disparage principles and convictions with which the user strongly disagrees. Thus that term is perhaps best put aside. Similarly, I hope and trust it is common ground that although the White House often does take "political views" into account, the Senate should not accord them any substantial weight lest the confirmation process break down in impasse whenever the Presidency is controlled by one party and the Senate by the other. I should hope it goes without saying that being a Reagan Republican, assuming for present purposes that is indeed what Judge Bork is, is not for the Senate a disqualifying factor in any judicial nominee. Were it otherwise partisanship would become too heavily and overtly injected into the process of selecting members of what must, above all other things, remain a scrupulously non-partisan institution.

It is surely on the basis of the judicial philosophy attributed to him, in a manner that has often partaken of gross caricature and serious distortion, that Judge Bork's nomination has become so controversial. Across the nation, interest and advocacy groups, on both the left and the right, those both in support and opposition, have addressed the issues posed by this nomination in terms of placard card slogans, as though the function of the Supreme Court were to help one group or another, to advance this or that agenda -- in short, to compete with the Congress and the President in the political role of formulating public policy. Interst and advocacy group politics is entirely appropriate for the selection of Presidents and Governors, Senators and Representatives, and state legislators, but the manner of and criteria for selecting Justices must be very different. It is both ironic and depressing to witness so many elected officials of government encouraging these interest and advocacy groups to think about this nomination in terms that would be perfectly appropriate if Judge Bork were seeking appointment to a superlegislature. It is ironic because the judicial philosophy with which Judge Bork is associated would accord greater authority and responsibility to elected officials, whereas the judicial philosophy espoused by the opponents of this nomination would accord them less of both. Judge Bork does not, for example, appear to think that, *stare decisis* aside, the Constitution would empower him as a Justice to decide under what circumstances abortion should be legally available, but does believe that question should be decided by the people's elected representatives, so many of whom seem to oppose his confirmation for predominantly that precise reason. Further encouraging the widespread distortion of the Supreme Court's role, many elected officials have even said that a Justice Bork would take away women's access to abortion, forgetting or concealing the fact that only they possess the authority to do that.

Some years ago Dean John Hart Ely wrote an important book entitled *Democracy and Distrust*, the thrust of which is that as a nation were are committed to democratic decisionmaking as the norm, but qualified by some residual distrust of unalloyed majoritarianism. Judicial review as exercised by the Supreme Court is the institutional embodiment of that distrust, and is almost by definition undemocratic if not anti-democratic. Judge Bork has never questioned the continuing need for judicially enforced restraints on sheer majoritarianism or the obligation of the courts to protect the rights of minorities and individuals. But his judicial philosophy is perhaps somewhat less distrustful of democracy and of the people's elected representatives than are many of the opponents of his nomination. This is how the matter should honestly and forthrightly be put to the American people by anyone who would responsibly elucidate the debate among them.

Judge Bork has repeatedly stated his unreserved agreement with the fundamental proposition that it is "emphatically the province of the judiciary to say what the law is," and that the law of the Constitution must prevail over majoritarian decisionmaking, and as a Court of Appeals judge he has acted on that agreement. But he is, in turn, somewhat more distrustful than many of his opponents of the legitimacy of judges finding new rights in the Constitution, which amount to new shackles upon democratic governance, rights that are not even suggested by the text of the document, much less stated in its language, rights which the historical data indicate formed no part of the intent of the framers or ratifiers, rights that were not even hinted at in hundreds of Supreme Court decisions handed down for many decades after the adoption of the relevant provision or amendment. Part of Judge Bork's nuanced and thoughtfully formulated distrust of judges as expositors of a "living Constitution," or in Justice Hugo Black's phrase, "making up the Constitution as you go along," may perhaps derive from his awareness that such a free-form, non-interpretivist approach to the Constitution carries with it strong temptations to the judiciary to play the heroic part and aggrandize its power in derogation of the power legitimately confided to the people and their elected representatives.

Labelling something as complex and multifaceted as a judicial philosophy risks sloganeering and oversimplification, but Judge Bork's philosophy is conventionally referred to as "judicial restraint" and its opposing counterpart "judicial activism." There is much that can be, and has been, said in favor of judicial activism by people of utmost good will who have thought deeply about these vexing issues and whose conclusions are entitled to be fully respected. But it seems to me that the philosophy of judicial restraint as elaborated by Judge Bork is similarly entitled to be respected, and it is nothing less than astonishing that it should be characterized by any knowledgeable person as "extremist." At the core of judicial restraint is the proposition, asserted by such great jurists as Holmes, Brandeis, and Frankfurter, to the effect that since those who enact legislation both represent the popular will _and_ have taken oaths to uphold the Constitution, judges should indulge a strong presumption of constitutionality. This was a nearly unquestioned maxim of constitutional law as it was taught and practiced until about three decades ago. Judge Bork is in no doubt but that the presumption of constitutionality can be rebutted, but would insist that it be so only on the basis of principles fairly derivable from the the intent of those who authored the Constitution and not on the basis of principles picked and chosen from the fashionable moral philosophies of the day by judges inspired by their personal value system. It is for legislators accountable to the people, not judges not directly so accountable, to act on their own personal values and preferences, or to represent those of their constituents.

Judge Bork has been savaged for having ventured to criticize many Supreme Court decisions of recent vintage, even though doing precisely that is a virtual prerequisite for gaining tenure on most law faculties, and certainly at Yale. Some of Judge Bork's criticism have been vigorously and trenchantly stated, but that is also very much in the tradition of legal academics in this country. Perhaps we American law professors should mend our ways and follow the example of our English counterparts, among whom criticism of judicial opinions is considered a breach of decorum. Much has been made by the opponents of his nomination of Judge Bork's criticism of _Roe v. Wade_, but I am not aware that he has said anything substantially different about that decision than Justice Byron White who, in dissenting, termed it "an exercise of raw judicial power . . . an improvident and extravagant exercise of the power of judicial review" for which he found "no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States." Did those words make Justice White an "ideologue" or an "extremist"? If they did, should not the Congress have moved to remove him from the Court by impeachment? If, as of course they did not, then how can words of comparable purport when written by Professor Bork be cited to make him out an ideologue or extremist?

Professor Bork was also critical of the reapportionment case, Baker v. Carr. In fact it has been charged by some who have appointed themselves arbiters of "mainstream opinion" that he has criticized that decision in extravagant terms that would never have been used by such "mainstream" judicial conservatives as Justices Frankfurter or Harlan. But Justice Frankfurter, in his dissent, himself criticized the decision as constituting the judges' "private views of political wisdom the measure of the Constitution," which is another way of saying that the decision was "unconstitutional." Justice Harlan, with whom Judge Bork has been unfavorably compared by so many opponents of his nomination, said in his dissent: "Those who consider that continuing national respect for the Court's authority depends in large measure upon its wise exercise of self-restraint and discipline in constitutional adjudication, will view the decision with deep concern." Should not Judge Bork's comments on Baker v. Carr be attributed to his "deep concern," shared by Justice Harlan, for "continuing national respect for the Court's authority," rather than to hostility toward that authority?

The legitimacy of judicial power rests upon very different premises from that of the elected branches, which latter derives from accountability to the people and from the ability of elected officials to make sound, equitable, and farseeing decisions on matters of public policy. The "morality of power" as it pertains to the judiciary, and preeminently to the Supreme Court given its unique position in our frame of government, is a morality of process consisting in the passionate commitment to rigorously reasoned analysis and openness to rational debate about how and when the Constitution's mandates legitimately and authentically override decisions conscientiously reached by the political branches. The debate to which any proposed Justice must be open focuses predominantly on the enormously difficult undertaking of separating out those mandates that are validly and objectively deducible from the Constitution in contrast to those that are largely shaped by what any majority on the Court believes is best for the country when that belief has not been shared by the majority of the relevant electorate. As would any jurist whose basic orientation is toward judicial restraint, Judge Bork is fully aware that all such debates, especially those within the Conference of the Supreme Court, are powerfully contrained by stare decisis, by precedent, particularly precedent which by repeated reaffirmation has become deeply entwined in the fabric of constitutional doctrine. At the same time, he has asserted that part of the Court's obligation is, on appropriate occasions, to reexamine past constitutional holdings in light of its evolving understanding of what the Constitution itself means. Surely no one who does not lament Brown's overruling of Plessy v. Ferguson could seriously doubt but that past constitutional decisions are not invincibly and invariably sacrosanct.

Judge Bork seems to me to be deeply and passionately committed to the kind of morality which sustains the legitimacy of judicial power. This is not a morality of substantive outcomes as much as it is a morality of process, and at the very heart of that process is openness to reasoned argument in the form both of litigants' briefs and oral arguments and of criticism and commentary from scholars and other observors of the Court's work. Thus, since his nomination, Judge Bork has steadfastly refused to say anything that would encourage his supporters in the pro-life movement to persist in their assumption that his would be a sure vote to overrule or limit Roe v. Wade. In 1981, before his appointment to the Court of Appeals, then Professor Bork courageously testified before the Subcommittee on Separation of Powers in opposition to the so-called "Human Life Bill," pursuant to which Congress would have overriden Roe v. Wade by means of ordinary legislation enacted under Sec. 5 of the Fourteenth Amendment. He did so because he cared more about the morality of process and the preeminent role of the Court in expounding the meaning of the Constitution than he did about maintaining his standing with the Right-to-Life movement. In fact it was widely reported in conservative publications that this testimony had prompted the Right-to-Life movement to write off Judge Bork as just another "moderate" who cared more about legal technicalities than about ending abortion. The contemporaneous rumor that it caused the White House to strike Professor Bork from its list of possible judicial nominees has now happily been twice proved false.

Judicial philosophy as it pertains to judicial review and the role of the Supreme Court is a house of many mansions. It encloses a broad range of differing views within the confines of honorable and thoughtful opinion. Judge Bork's views place him well within those confines, and indeed place him within a great tradition which includes many of America's finest jurists, including Supreme Court Justices. It would be a tragic mistake for the Senate, in voting on this nomination, in effect to proclaim that mere fidelity to the great tradition of judicial restraint is a sufficient reason to withhold its consent to confirmation of a nominee so eminently qualified by virtue of personal integrity and professional distinction as is Judge Bork.

The role of the Supreme Court in American government is surely the least well understood facet of that government by the American people. Much of the popular response to this nomination appears to have raised this lack of understanding to new heights of ignorance and distortion. It is therefore fitting that the Founders lodged the power to confirm Supreme Court nominees with the Senate, which should be, and most often in the past has been, capable of understanding how delicately that institution is related to the morality of process, rather than to the bottom-line calculus of substantive results. In acting on this nomination, the Senate has a rare opportunity, an opportunity both to preserve and reinforce the morality of process and to educate the American people in the need to subordinate ordinary political concerns and factitious ideological distractions when that process is placed in dire jeopardy.

Respectfully submitted,

Maurice J. Holland

Maurice J. Holland

Senator HEFLIN. Dean Morgan.

TESTIMONY OF THOMAS MORGAN

Mr. MORGAN. Thank you, Mr. Chairman.

I, too, appreciate the opportunity to appear before this committee with respect to this crucial nomination. I appear as an individual, and my views should not be attributed to Emory University or its law school, where I serve on the faculty, and which I served as dean from 1980 to 1985.

My testimony will urge two points. They relate to the concerns sometimes expressed here that Judge Bork has seemed to be both internally inconsistent over the years, and disrespectful of Supreme Court precedent. I believe that both criticisms are unjustified.

First the alleged lack of respect for precedent. The reason why an academic writer often takes positions that seem critical of prior cases is that a law professor is teaching and writing with a different focus than is the judge or a practicing attorney.

A professor who is thoughtful about what he or she is doing recognizes that students in today's law schools will be practicing well into the next century. Last week's newsworthy case will usually be relatively unimportant to the student over such a legal career.

What each student will need over a lifetime is the ability to reason through the issues which lawyers face. The development of that reasoning capacity requires asking fundamental questions underlying our legal system—questions such as: What is the function of a court? What are the rules that should limit the President, legislatures, agencies, and the courts themselves as they govern a free society? Has the decision failed to give us reasoning that we can apply over the years, even if we like the result in the short run?

Far from being ivory tower issues, the challenge for those of us in law teaching is to address such questions seriously, and to help our students address them. For it is in developing the ability to think seriously, about fundamental issues, that students develop the tools with which to tackle the more specific and practical, but largely unpredictable, questions that they will face throughout their practice.

Such teaching and writing requires the scholar to challenge the reasoning of past decisions, no matter how old or settled, because reasoning is what is being examined. Outside of academic life, of course, all of us are used to dealing with more concrete expressions of the issues. This committee has posed concrete questions to Judge Bork, and he has answered.

Senator HEFLIN. Dean, I apologize for having to interrupt you, but I had to leave to go vote.

The CHAIRMAN. I apologize for these interruptions. The votes we have to make. Thank you.

Mr. MORGAN. Thank you, Senator.

I was simply where I was suggesting that the committee has posed concrete questions to Judge Bork, which he has answered, insofar as propriety permitted, both in hypothetical form and by pointing to his nonacademic record. And that is as he should answer those concrete questions, because to see how he thinks about specific issues one must look to the portion of Judge Bork's career in which he has worked in specific cases—to his record as an advocate and as a judge.

It is in those two roles that he has been required to determine how important general principles apply to particular human individuals. When faced with situations where his general theory runs up against his obligation to adhere to settled law, he has been obliged to follow precedent, and he has. His record as a judge and advocate is clearly outstanding, as, I believe, would be his work as a Justice.

It has been asked how the committee can be sure that a person with Judge Bork's critical view of the reasoning of many Supreme Court cases would, nonetheless, adhere to those cases when on the Court himself.

I can only answer that the fundamental principle that Judge Bork has asserted about judging, is that judges themselves must be bound by the law. That is his point about the need to ground constitutional decisions fairly in the language of the Constitution.

If we look at his whole approach, then, not just the criticism of individual decisions, we find no basis to doubt that his performance as an advocate and judge is the so-called real Robert Bork. There is no serious basis to doubt that he would only vote to overrule cases in the limited principled circumstances that he has described to this committee.

Second, the charge that Judge Bork is internally inconsistent in his positions, and changes them to suit the occasion: I believe that quite the contrary is true. I see a consistent thread that runs through Judge Bork's work, across his career. In making this point, I am to some extent putting words into his mouth, and he should not be blamed if I prove inarticulate in doing so.

But I believe it's fair to say that one of the central principles running through his views can be put in the words of the first principle of physicians: Above all, do no harm. In other words, don't make things worse.

In his antitrust writing, for example, the work that first brought Judge Bork to national attention, he consistently asked a basic question which others had not been regularly asking: Is the application of the Sherman or Clayton Act to a given situation one that will make consumers better off, as Congress intended, or will it, unintentionally but in fact, do harm to consumers?

In answering that question he favored strict enforcement of laws against price fixing, but opposed enforcement of the antitrust laws against innovative firms which were challenging entrenched but less efficient ones. He also encouraged allowing mergers which were too small to create problems of monopoly, but which would improve efficiency, and thus tend to drive consumer prices down.

"Antitrust laws are fine, as long as they tend to solve problems," Judge Bork might say, "but not when they themselves become the problem."

The CHAIRMAN. Even if the Congress wants to make him a problem?

Mr. MORGAN. I'm sorry, Senator?

The CHAIRMAN. Even if the Congress wishes to create the problems he's attempting to solve?

Mr. **Morgan**. I think it's absolutely clear, Mr. Chairman, that Judge Bork would enforce a law which Congress passed, which specifically spoke to a given situation. Actually, he has not had any such antitrust cases on the court of appeals. Presumably, if he were testifying as a private citizen on the bills he would urge the kind of views that I have attributed to him here.

There could be other illustrations of this principle, as well, but finally I will close with the issue of privacy.

There are few deeper ironies in this hearing than the portrayal of Robert Bork as opposed to liberty. His whole career is consistent with the view that concepts of limited government, and human freedom, run throughout the substance and structure of the Constitution.

What Judge Bork properly fears, however, is that a Supreme Court which adopts a legal test which is not grounded in a fair reading of the Constitution is a Court that potentially can do more harm than good. It may make up the law in a way that you and I like today, but it could restrict our rights as easily tomorrow.

No one can be against privacy—yours or mine or Judge Bork's. But Judge Bork has been asserting an important and, I believe, a mainstream principle: The scope of legal redress must end when taking it farther would tend to do more harm than good.

Much has been written about what Judge Bork said in 1971.

The **Chairman**. Are you summing up, Professor?

Mr. **Morgan**. Yes, Sir.

The **Chairman**. Thank you.

Mr. **Morgan**. I would call your attention to something he wrote in 1984, after he became a judge, and well before any argument about confirmation conversion. He called it, "Styles in Constitutional Theory," and in it he explained how a judge must think about great constitutional questions.

Judge Bork wrote: "The institutions and traditions of the American Republic, including the historic Constitution, are our best chance for happiness and safety. Yet it is precisely these institutions and traditions that are weakened and placed in jeopardy by the habit of abstract philosophizing about the rights of man or the just society."

"Our institutions and traditions were built by and for real human beings. They incorporate and perpetuate compromises and inconsistencies. They slow change, tame it, deflect and modify principles as well as popular simplicities. In doing that, they provide safety and the mechanism for a morality of process."

Those are not the words of a man with a social agenda to pursue. They are not the words of a man who wants to turn back the clock on civil rights or on privacy. They are the words of someone who has served with distinction, as a professor at one of this country's great law schools, a practicing lawyer, the nation's chief appellate advocate, and judge of one of this country's most important courts.

I respectfully submit that there is simply no one better qualified than Robert Bork to sit now as a Justice on the Supreme Court of the United States.

Thank you.

The CHAIRMAN. Thank you, Dean. I think you've got it right this time.

[Statement of Mr. Morgan follows:]

STATEMENT OF PROFESSOR THOMAS D. MORGAN, EMORY UNIVERSITY

BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE,
CONSIDERING THE NOMINATION OF HON. ROBERT H. BORK TO BE AN
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

SEPTEMBER 29, 1987

Mr. Chairman and Members of the Committee:

My name is Thomas D. Morgan. I have the title Distinguished Professor of Law at Emory University, and I served as Dean of the Law School at Emory from 1980 to 1985. Apart from a period of military service, I have been a law teacher since 1965.

I appreciate the opportunity to testify before this committee with respect to this critically important nomination. I appear as an individual and not on behalf of any group or organization. My views should not be attributed to Emory University or its law school.

My testimony will urge two points. They relate to the concerns sometimes expressed here that Judge Bork has seemed to be both internally inconsistent over the years and disrespectful of Supreme Court precedent. I believe that both criticisms are unjustified.

First, the alleged lack of respect for precedent.

The reason why an academic writer often takes positions that seem critical of prior cases is that a law professor is teaching and writing with a different focus than is the judge or practicing attorney. A professor who is thoughtful about what he or she is doing recognizes that students in today's law schools will be practicing well into the 21st Century. Last week's newsworthy case will usually be relatively unimportant to the student over such a legal career. What each student will need over a lifetime, however, is the ability to reason through the issues which lawyers face.

The development of that capacity requires asking fundamental questions underlying our legal system, questions such as: What is the function of a court? What are the rules that should limit the president, legislatures, agencies, and the courts themselves as they govern a free society? Has a decision failed to give us reasoning that we can apply over the years, even if we like the result in the short run?

Far from being ivory tower issues, the challenge for those of us in law teaching is to address such questions seriously and help our students address them. For it is in developing the ability to think seriously about fundamental issues that students develop the tools with which to tackle the more specific and practical, but largely unpredictable questions that they will face throughout their practice. Such teaching and writing requires the scholar to challenge the reasoning of past decisions, no matter how old or settled, because reasoning is what is being taught.

Outside of academic life, of course, all of us are used to dealing with more concrete expressions of the issues. This Committee has posed such questions to Judge Bork and he has answered, both in hypothetical form and by pointing to his non-academic record. And that is as he should answer, because to see how he thinks about concrete questions, one must look to the portion of Judge Bork's career in which he has worked in concrete cases -- to his record as an advocate and as a judge. It is in those two roles that he has been required to determine how important general principles apply to particular human individuals, and when faced with situations where his general theory runs up against his obligation to adhere to settled law, to follow precedent.

His record as a judge and advocate is clearly outstanding, as would be his work as a Justice. It has been asked how the committee can be sure that a person with Judge Bork's critical views of the reasoning of many Supreme Court cases would nonetheless adhere to those cases when on the Supreme Court. I can only answer that the fundamental principle he has always asserted about judging is that judges themselves should be bound by the law. That is his point about the need to ground Constitutional decisions fairly in the language of the Constitution.

If we look at his whole approach, then, not just the criticism of individual decisions, we find no basis to doubt that his performance as an advocate and judge is the "real" Robert Bork. There is no serious basis to doubt that he would only vote to overrule cases in the limited, principled circumstances that he described to you.

Second, the charge that Judge Bork is internally inconsistent in his positions and changes them to suit the occasion.

I believe quite the contrary is true. I see a consistent thread that runs throughout Judge Bork's work, across his career. In making this point, I am to some extent putting words into his mouth, and he should not be blamed if I am inarticulate in doing so. But I believe it is fair to say that one of the central principles running through his views can be put in the words of the first principle of physicians: "Above all, do no harm."

In his antitrust writing, for example, the work which first brought Judge Bork to national attention, he consistently asked a basic question which others had not been regularly asking: Is the application of the Sherman or Clayton Act to a given situation one that will make consumers better off as Congress intended, or will it -- unintentionally, but in fact -- do harm to consumers?

In answering that question, he favored strict enforcement of laws against price fixing, but opposed enforcement of the antitrust laws against innovative firms which were challenging entrenched but less efficient ones. He also encouraged allowing mergers which were too small to create problems of monopoly but which would improve efficiency and thus tend to drive consumer prices down. Antitrust laws are fine as long as they tend to solve problems, Judge Bork might say, but not when they themselves become the problem.

You see the "do no harm" approach as well in the issue of Congressional standing. For his position on that issue, Judge Bork has been characterized as excessively loyal to the executive branch and insensitive to Congress' need for a day in court. What he said to you here, however, is consistent with what he said in Barnes v. Klein, 759 F.2d 21 (D.C. Cir. 1985), and with the thesis that I am attributing to him.

Judge Bork has been worried that if the courts are receptive to resolving legislative/presidential conflicts, disputes will tend forever to wind up in the courts. Thirty years ago, for example, it seemed common for major labor disputes to be mediated by the Secretary of Labor. Today, it is rare. We ultimately came to recognize that if the Secretary's office is routinely open in such cases, it changes the whole set of bargaining incentives, and not for the better. Everyone then bargains wondering whether they could do better in the Secretary's office.

I do not question for a moment -- and I am confident Judge Bork does not -- that disputes between Congress and the President involve matters where the stakes for all of us are extremely high. Indeed, lately, they often implicate questions of war and peace. But they are disputes which Congress and the President have many political tools with which to resolve. In the old days, we called such issues "political questions" and Justice Frankfurter was particularly concerned that the federal courts avoid them.

Intervention of courts into that policymaking process could do more harm than good, Judge Bork has said. And whether or not you believe he is right, you can see that his view is neither opportunistic nor inconsistent with the way he has traditionally approached difficult questions.

There could be other illustrations, but finally, there is the issue of privacy. There are few deeper ironies in this hearing than the portrayal of Robert Bork as opposed to liberty. His whole career is consistent with the view that concepts of limited government and human freedom run throughout the substance and structure of the Constitution; they are not even limited to the Bill of Rights.

What Judge Bork properly fears, however, is that a Supreme Court which does not consider itself bound by the limits of a fair reading of the Constitution is a Court that potentially can do more harm than good. It may make up the law in a way that you and I like today, but it could restrict our rights as easily tomorrow if we fail to insist that courts operate within legal standards which are fairly traceable to the Constitution or a valid statute.

Again, no one can be against privacy -- yours or mine, but Judge Bork has been asserting a mainstream principle that is important: The scope of legal redress must end when going farther would tend to do more harm than good.

Much has been made of what Robert Bork wrote in 1971. I would call your attention to something he wrote in 1984 -- after he became a judge and well before any argument about confirmation conversion. It was published in the South Texas Law Review and then the Yearbook of the Supreme Court Historical Society. He called it "Styles in Constitutional Theory", and in it he explained how a judge must think about great Constitutional questions. Judge Bork wrote:

> "The institutions and traditions of the American republic, including the historic Constitution, are our best chance for happiness and safety. Yet it is precisely these institutions and traditions that are weakened and placed in jeopardy by the habit of abstract philosophizing about the rights of man or the just society. Our institutions and traditions were built by and for real human beings. They incorporate and perpetuate compromises and inconsistencies. They slow change, tame it, deflect and modify principles as well as popular simplicities. In doing that, they provide safety and the mechanism for a morality of process."

Those are not the words of a man with a social agenda to pursue. They are not the words of a man who wants to turn back the clock on civil rights or on privacy. They are the words of someone who has served with distinction as a professor at one of this country's great law schools, a practicing lawyer, the nation's chief appellate advocate, and judge of one of this country's most important courts.

There is simply no one better qualified than Robert Bork to sit now as a Justice of the Supreme Court of the United States.

The **Chairman**. Dean Rostow.

Mr. **Rostow**. I have a prepared statement which I think you have.

The **Chairman**. It will be placed in the record.

Mr. **Rostow**. And I will cut it ruthlessly in order to stick within your 5 minutes.

The **Chairman**. Thank you.

TESTIMONY OF EUGENE ROSTOW

Mr. **Rostow**. First, however, I do want to say how glad I am to see you again in this posture which is so familiar to both of us, and I'm grateful for an opportunity to testify in these hearings which are of great importance.

But I should make it clear that I am neither a detached nor an impartial witness. I proposed Judge Bork for the Yale law faculty, and supported him in that post with great enthusiasm, and we've been colleagues and friends for something like 30 years. We don't always agree, but we both have the temperament of lawyers who would find complete agreement on these difficult and contentious issues, even among friends, not only inconceivable but boring.

Now, I made a point which Dean Holland made also, and I simply want to emphasize it. I'm not one of those who think that the Senate should be a rubber stamp for any Presidential nominee if satisfied that he or she is professionally qualified and a person of good moral character.

I fully share the view that the Senate should take the nominee's judicial philosophy into account, but there is a risk and a limit to that. The Senate must not—should not, at any rate try to usurp the President's power of appointment. That is a point I think all of you should keep in mind in reaching your ultimate judgment on this matter.

In my view, your hearings have not raised a serious issue about Judge Bork's rectitude or his intellectual qualifications for the post. It seems to me that the sole question before you is whether his judicial philosophy so offends the Senate as to justify its refusal of consent.

You will note, I did not say the issue is whether you agree with his judicial philosophy and record, or find it congenial, or even comfortable. The question, as I see it, is quite different.

Many of you, I know, have concluded, as I have, that Judge Bork should be confirmed on the merits. Some are opposed or doubtful. To you, the doubtful ones, or the opposed ones, I say, particularly, the constitutional issue is whether you can honorably conclude that Judge Bork's jurisprudence is so outrageous as to fall outside the zone of the President's constitutional discretion in making nominations.

In making that decision, I appeal to you to recall that some of the most influential and useful judges in the history of the Court were not full members of what has been called here the mainstream of constitutional opinion, but dissenters; often lonely voices in the wilderness whose views prevailed in the long run. Holmes, Brandeis and the elder Harlan all belong to this precious and remarkable group.

Now, fond as I am of Bob Bork, and much as I admire him, I do not agree with him on some important issues. But I cannot see much doubt about the answer to the question before you as I have phrased it. Judge Bork is not a beady-eyed zealot, or a crank, in any conceivable sense of those terms, nor has he practiced politics from the bench.

In my prolonged experience with him, he is exactly what he so clearly appeared to be at your hearings: an honest and serious intellectual whose professional life has been a prolonged and continuing struggle to adjust the judicial philosophy he was taught years ago to the realities of law as a living growth. I need hardly add that he did not acquire his earlier judicial philosophy as a student at the Yale Law School.

The judicial philosophy with which Judge Bork started his career is a perfectly respectable commonplace in the legal literature, the proposition, namely, that judges should find the law, not make it; but adhere strictly to the original intent of the lawmakers, and leave to the legislatures and the people the task of changing the law.

This thesis is recited quite as piously by liberals as by conservatives, whatever those terms may mean in their application to the law.

In the course of his strenuous pilgrimage in the law, Judge Bork discovered that this view is entirely inadequate as a guide to the process of law in the life of society.

Most of Judge Bork's testimony in these hearings is a courageously frank account of the evolution of his legal philosophy in response to his experience. In his remarkable opening statement before this committee, Judge Bork quite properly distinguished between a judge's personal values which he should rigorously exclude from consideration as best he can and those of the law to which he should try with all his might to be faithful.

The greatest sentence ever written by John Marshall, in my view, is this one: "We should never forget that it is a Constitution we are expounding." By that he meant three things, I believe.

First, the Constitution is and should be a brief general document, not a prolix code. The Constitution should be a document which every citizen can understand as a statement of the principles and values intended to guide the evolution of the government and the society for ages to come. Thus, it leaves detail to be settled by future practice, by legislation, and by adjudication.

Second, the Constitution should develop, as every law develops, in response to changes in circumstance and, above all, the changes in the moral code of the society, the spirit of its law, its aspiration for the future.

And third, the Constitution, however adaptable, should have enormous continuity. As Judge Bork said here, the judge's task in constitutional cases where the words in the Constitution are rarely precise is normally to find the principle or value that was intended to be protected and to see to it that it is protected.

The judicial duty is to ensure that the powers and freedom the framers specified are made effective in today's circumstances.

The judge's duty under our Constitution is a complex task of great difficulty and overwhelming importance. It requires discipline and restraint on the part of the judge as well as professional skill, respect for the law, and ultimately intuition into the moral evolution of the country.

The original intent of the lawmakers, especially in the constitutional field, is either unknowable or hopelessly obscure. And in any event, it is only one of the factors which judges should take into account in deciding cases.

Judges can't help making some law as they interpret the Constitution. Holmes once said they make law interstitially; that is, they fill in gaps left by the original lawmakers. Whatever metaphor one uses to describe the judge's role in lawmaking, one must acknowledge it.

Judges should exercise their authority with great care. They should not confuse the judicial role in making law with that of the legislatures or the people, but it is simplistic to suppose that it can be denied.

Not many nominees for appointment to the Supreme Court could have explained the judicial process as well and as honestly as Judge Bork has done in these hearings, with as much sophistication, as much learning, and as much passion for the law.

These hearings have been a remarkable event in other ways as well. No one could have heard or read the testimony of some of the witnesses—Barbara Jordan, for example, or William Coleman—without being moved and troubled. They are concerned about the possibility that the immense progress in our constitutional law of personal liberty accomplished by the leadership of the Supreme Court since the time of Chief Justice Hughes would be placed in jeopardy by the appointment of Judge Bork. Such a possibility would indeed be a matter for universal alarm. But their fear is groundless.

Similar fears were widely held about the revolutionary changes in constitutional law which were expected during Chief Justice Burger's term of office. That revolution did not take place then, and it will not take place now.

The development of law has immense momentum. It grows according to its own rules, case by case, generation after generation. It will prevail once again.

The libertarian tradition of American society reinforced by its law does not belong to either political party or to any one intellectual or ideological sect. It is a national creation and a national possession made by thousands of men and women over the years, Republicans, Democrats, Federalists and Whigs alike; liberals, conservatives, and radicals; judges, citizens, writers, political leaders.

As these hearings have demonstrated, that achievement, the achievement of this long line of creators, has the strong support of the American people as a whole. There is no danger that this mighty edifice will fall, and I can assure you on the basis of many years of experience that Robert Bork belongs firmly in the camp of those who believe in liberty protected by law.

Thank you, Mr. Chairman.

[Statement of Mr. Rostow follows:]

Committee on the Judiciary

United States Senate

September 29, 1987

Opening Statement of

Eugene V. Rostow*

I am grateful for the opportunity to testify in these important hearings. I should make it clear, however, that I am neither a detached nor an impartial witness. Judge Bork was invited to join the Yale Law Faculty at my suggestion, and with my enthusiastic support. We have been colleagues and friends for some thirty years. During that period we have shared several thousand conversations, parties, meals, faculty meetings, and forays into public affairs. All these associations have had the tone of ease, confidence, and candor that thrives only in a climate of mutual trust and mutual respect. We have not always agreed. But we both have the temperament of lawyers who would find complete agreement on difficult and contentious issues, even among friends, not only inconceivable but hopelessly boring.

I wrote a letter in Judge Bork's behalf. It appeared in The New York Times on August 21, 1987. Unfortunately, I was not available just before the Times printed it. The Times made a few minor editorial excisions in the interest of space. I should appreciate it, therefore, if you allowed me to append the original form of the letter to this statement for the record, along with a copy of the published version.

In my letter to the Times, I suggested that the Senate should respect the Constitutional distinction between the President's function in nominating justices and the Senate's function in consenting to their appointment. I am not one of those who believe that the Senate should approve any Presidential nominee if it is satisfied that the he or she is professionally qualified and a person of good moral character. Not at all. I fully share the view that the Senate should take the nominee's judicial philosophy into account. Sometimes that consideration produces sensible results--the case of Judge Carswell comes to mind--and sometimes unfairness, as in the rejection of Judge Parker and Judge Haynsworth. What I do believe, however, and believe very strongly, is that the Senate should not try to usurp the President's power of appointment. I hope we should all agree, for example, that it would be wrong--wrong Constitutionally--for a Senate controlled by its Republican members to tell a Democratic President that it would advise and consent only to the appointment of Republican justices, or to name one or perhaps two people it would accept, and refuse to consider any other nominees.

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*Sterling Professor of Law and Public Affairs Emeritus, and Senior Research Scholar, Yale Law School, Dean of the Yale Law School, 1955-65, and Distinguished Visiting Research Professor of Law and Diplomacy, National Defense University, 1984--.

On this point, I recall to you the dilemma Congress faced when Vice-President Agnew resigned. For the first time, Congress had the responsibility under the XXVth Amendment to fill a vacancy in the office of Vice-President. The Democratic Party controlled both Houses of Congress. The press reported at the time that the Speaker of the House, Tip O'Neill, told a representative of the President that the President had the power of appointment and that Congress expected a Republican nominee as a matter of course. The Democratic Party had no intention of taking advantage of circumstances to seize the office of Vice-President.

I do not mean to imply that the precedent is on all fours. Appointment to a political office or to the Cabinet is not the same as the appointment of judges. But the cases are not altogether different, either. Political considerations were surely more pertinent in the selection of Gerald Ford as Vice-President than they should be in the confirmation of Robert Bork as Associate Justice of the Supreme Court. The Constitutional principle in each case is the same

The success of the Supreme Court since 1789 has depended in considerable part not only on the example of its greatest members but on the alternating impulses of the American political process. The ebb and flow of politics have brought judges of different outlook to the Court as Presidents and Congress have changed. That fact has helped to keep the federal courts and the Supreme Court in particular close to the changing moral code of the country.

I am aware that the Senate has not always adhered to Speaker O'Neill's salutary rule. But I submit that it is and should be the Constitutional norm guiding your decision in consenting or not consenting to a Presidential nomination to the Supreme Court.

In my view, your hearings have not raised a serious issue about Judge Bork's rectitude or his intellectual qualifications for the post. The sole question before you is whether Bork's judicial philosophy so offends the Senate as to justify its refusal of consent. You will note I did not say that the issue is whether you agree with his judicial philosophy and record, or find it congenial or even comfortable. The question, as I see it, is quite different. Many of you, I know, have concluded, as I have, that Judge Bork should be confirmed on the merits. Some are opposed or doubtful. To you, I say particularly, the Constitutional issue is whether you can honorably conclude that Judge Bork's jurisprudence is so outrageous as to fall outside the zone of the President's Constitutional discretion in making nominations. In making that decision, I appeal to you to recall that some of the most influential and useful judges in the history of the Court were not full members of what has been called here "the mainstream" of Constitutional opinion, but dissenters, often lonely voices in the wilderness, whose views prevailed in the long run. Holmes, Brandeis, and the elder Harlan all belonged to this precious and remarkable group.

Fond as I am of Bob Bork, and much as I admire him, I do not agree with him on some important issues. However, I cannot see much doubt about the answer to the question before you as I have phrased it. Judge Bork is not a beady-eyed zealot or a crank in any conceivable sense of those terms. Nor has he practised politics from the bench. In my prolonged experience with him, he is exactly what he so clearly appeared to be at your Hearings:--an honest and serious intellectual whose professional life has been a prolonged and continuing struggle to adjust the judicial philosophy he was taught years ago to the realities of law as a living growth.
I need hardly add that he did not acquire his earlier judicial philosophy as a student at the Yale Law School, the home of legal realism and then of legal idealism.

The judicial philosophy with which Judge Bork started his career is a perfectly respectable commonplace in the legal literature:--the proposition, namely, that judges should find the law, not make it, but adhere strictly to the original intent of the law makers, and leave to the legislatures and the people the task of changing the law. The thesis is recited quite as piously by "liberals" as by "conservatives." What Judge Bork discovered in the course of his strenuous pilgrimage is that this view is entirely inadequate as a guide to the process of law in the life of society.

Most of Judge Bork's testimony in these hearings has been a courageously frank account of the evolution of his legal philosophy in response to his experience.

In his remarkable opening statement before this Committee, Judge Bork quite properly distinguished between a judge's personal values, which he should rigorously exclude from consideration as best he can, and those of the law, to which he should try with all his might to be faithful.

The greatest sentence ever written by John Marshall, in my view, is, "We should never forget that it is a constitution we are expounding." By that he meant three things, I believe. First, the Constitution is and should be a brief general document, not a "prolix code." A constitution should be a document which every citizen can understand as a statement of the principles and values intended to guide the evolution of the government and society for ages to come. Thus it leaves detail to be settled by future practice, legislation, and adjudication. Secondly, the Constitution should develop, as every law develops, in response to changes in circumstance and, above all, to changes in the moral code of society, the spirit of its law, its aspiration for the future. Third, the Constitution, however adaptable, should have enormous continuity. As Judge Bork said, the judge's task in constitutional cases, where the words in the Constitution are rarely precise, is normally "to find the principle or value that was intended to be protected and to see to it that it is protected. [The judicial duty] is to insure that the powers and freedoms the framers specified are made effective in today's circumstances."

The judge's duty under our Constitution is a complex task of great difficulty and overwhelming importance. it requires discipline and restraint on the part of the judge as well as professional skill, respect for the law, and ultimately intuition into the moral evolution of the country. The original intent of the law makers, especially in the Constitutional field, is either unknowable or hopelessly obscure, and in any event is only one of the factors which judges should take into account in deciding cases. Judges can't help making some law as they interpret it. Holmes once said they make law "interstitially"--that is, they fill in gaps left by the original law makers. Whatever metaphor one uses to describe the judge's role in law making, one must acknowledge it. The judges should exercise their authority with great care. They should not confuse the judicial role in making law with that of the legislatures or the people. But it is simplistic to suppose that it can be denied.

Not many nominees for appointment to the Supreme Court could have explained the judicial process as well and as honestly as Judge Bork has done in these Hearings, with as much sophistication, as much learning, and as much passion for the law.

These Hearings have been a remarkable event in other ways as well. No one could have heard or read the testimony of some of the witnesses--Barbara Jordan, for example, or William Coleman--without being moved and troubled. They are concerned about the possibility that the immense progress in our Constitutional law of personal liberty accomplished by the leadership of the Supreme Court since the time of Chief Justice Hughes would be placed in jeopardy by the appointment of Judge Bork. Such a possibility would indeed be a matter for universal alarm. But their fear is groundless. Similar fears were widely held about revolutionary changes in Constitutional law which were expected during Chief Justice Burger's term of office. That revolution did not take place then, and it will not take place now. The development of law has immense momentum. It grows according to its own rules, case by case, generation after generation. It will prevail once again.

The libertarian tradition of American society, reinforced by its law, does not belong to either political party or to any one intellectual or ideological sect. It is a national possession, the creation of thousands of men and women over the years, Republicans, Democrats, Federalists, and Whigs alike; Liberals, Conservatives, and Radicals; judges, citizens, writers, political leaders. As these Hearings demonstrate, their achievement has the strong support of the American people as a whole. There is no danger that this mighty edifice will fall. And I can assure you, on the basis of many years of experience, that Robert Bork belongs firmly in the camp of those who believe in liberty protected by law.

DEPARTMENT OF DEFENSE
NATIONAL DEFENSE UNIVERSITY
WASHINGTON D C 20319-6000

REPLY TO
ATTENTION OF

August 3, 1987

Institute for National Strategic Studies

Letters to the Editor
The New York Times
229 W. 43rd Street
New York, N.Y. 10036

To the Editor:

Kenneth B. Noble's report on the dismissal of Archibald Cox by Judge Bork in 1973 July 26 is marred by an inexplicable omission: it does not explain why Messrs. Richardson and Ruckelshaus felt disqualified to carry out President Nixon's order, and therefore resigned. Both men had testified to a Senate Committee that they would not dismiss Mr. Cox. Judge Bork faced no such moral obstacle. All three were rightly concerned about protecting the strength and integrity of the Department of Justice. They were equally clear that the President had the constitutional power to remove senior officials of the Executive Branch, a category which in their view included Mr. Cox. This opinion was not peculiar to Mr. Bickel, as Mr. Noble suggests. It is an inescapable aspect of the President's executive power, as has been recognized by an unbroken line of authority since James Madison. The principle survived Judge Gesell's carefully qualified opinion on the subject.

Mr. Noble writes as if Judge Bork's concern with the President's legal authority to fire Mr. Cox betrays a "narrow" and "legalistic" approach to the problems he would face if appointed to the Supreme Court. The headline for his story starkly contrasts "law" and "principle", as if law were not by definition the embodiment of the law-maker's principles. The Constitution entrusts Congress, the President, and the Courts with the discretion to decide certain questions with finality. The President's capacity to remove senior officials at his pleasure is one of those powers.

The controversy over the confirmation of Judge Bork shows signs of straying from the principal issue presented by his nomination. No one questions Judge Bork's outstanding personal and professional qualifications for the post. The debate is now focussed on whether the Senate finds his judicial philosophy congenial. The substance of a candidate's legal philosophy is of course germane to the issue of confirmation. The question before the Senate, however, should be more precisely defined.

The balance of the Supreme Court's jurisprudence has been achieved and maintained for nearly two hundred years not only by the vision and example of its leading justices but by the natural rhythm of the political process. Presidents of different outlook nominate justices they think would share their point of view about the Court. Within broad limits, the Senate and the opposition party have recognized the propriety and value of this alternation of impulses in keeping the compass of the Court reasonably close to the moral code of the nation as a whole. By this standard, Judge Bork's nomination comes well within the zone of discretion the Senate has recognized as properly the President's. For the Senate to insist on more would be to assume the President's power to nominate as well its own power to confirm.

Yours faithfully,

Eugene V. Rostow

Eugene V. Rostow
Distinguished Visiting Research Professor
of Law and Diplomacy

Peru, Vermont

The New York Times

August 21, 1987

Letters to the Editor
Page A26

Letter from Professor Eugene Rostow

Iran and Saudis Differ on '43 Incident in Mecca

To the Editor:

In "The Ancient Sunni-Shiite Feud" (Op-Ed, Aug. 5), Martin Kramer presents one side of the December 1943 incident in which an Iranian Shiite pilgrim was condemned by a Saudi Arabian magistrate and executed for defiling the area around the Kaaba, the sacred Moslem shrine in Mecca.

On the evidence of returning Iranian pilgrims, the Foreign Ministry in Teheran claimed in mid-January 1944 that the young man in question had been overcome by the heat while performing the ritual circumambulation of the monument, and had vomited into his robe rather than risk messing the courtyard of the Grand Mosque. Sunnis who observed his condition later that day accused him of smuggling excrement into the area to pollute it. The Saudi religious court acted on the evidence of these witnesses.

When the Iranian Government formally demanded reparations for the hasty execution and assurances such episodes would not be repeated, Saudi officials replied that the condemned man was the ringleader of a gang of Shiites intent on defiling the shrine. Teheran denied this further accusation and prevented Iranian nationals from participating in the pilgrimage to Mecca the following year, perhaps disingenuously blaming problems associated with wartime transportation.

Who is to say at this late date which of these versions is nearer to the truth?

FRED H. LAWSON
Assistant Professor of Government
Mills College
Oakland, Calif., Aug. 5, 1987

Let Public In on Search For School Chancellor

To the Editor:

A school chancellor with "public stature" and "executive ability" (editorial, Aug. 13) is certainly needed for the New York City school system. As the Board of Education seeks a new chancellor, it should look for a person of vision, leadership capacity and the skill and self-assurance to attack management issues forthrightly and foster local initiative in revitalizing districts and schools.

The recruitment for this office must also respect the right of our mostly minority city residents who use the schools to expect leadership that resonates to their experience and inspires their children with hopes for their own futures. One way to assure that is by involving a diversely constituted group of city people in a genuinely open recruitment.

The Board of Education should depart from its usual behind-the-scenes approach to filling the chancellorship and immediately involve the public in development of criteria and a national search for candidates. Public deliberation would bring more capa-

Living in New York

To the Editor:

I live in a women's residency in Manhattan. I am a mature woman, a skilled medical secretary and am looking for an apartment. When apartments rent for $800 a month — considered low in Manhattan — you must have a verifiable income of $40,000 a year. None of the highly skilled secretaries I work with earn more than $25,000. Rents in your ads are equally high for the other boroughs and areas around New York City, when you consider the cost of commuting and such hazards as crime and delays.

Many people I talk with who earn less than $30,000 have a strong desire to leave. We feel our labor is needed, but our needs for appropriate living conditions are not considered a priority. We constantly see new, luxury housing erected and absolutely nothing done for the needs of working people.

JOAN ASKEW
New York, Aug. 9, 1987

To the Editor:

Your report on the dismissal of Archibald Cox by Judge Bork in 1973 (July 26) is marred by an inexplicable omission: it does not explain why Attorney General Elliot L. Richardson and his deputy, William D. Ruckelshaus, felt disqualified to carry out President Nixon's order, and therefore resigned. Both had testified to a Senate committee that they would not dismiss Mr. Cox. Judge Bork faced no such moral obstacle. All three were rightly concerned about protecting the strength and integrity of the Department of Justice. They were equally clear that the President had the constitutional power to remove senior officials of the executive branch, a category which in their view included Mr. Cox.

This opinion was not peculiar to Prof. Alexander M. Bickel, as you suggest. It is an inescapable aspect of the President's executive power, recognized by an unbroken line of authority since James Madison. The principle survived Federal District Judge Gerhard A. Gesell's carefully qualified opinion on the subject.

You write as if Judge Bork's concern with the President's legal authority to fire Mr. Cox betrays a "narrow" and "legalistic" approach to the problems he would face if appointed to the Supreme Court. The Constitution entrusts Congress, the President and the courts to decide certain questions with finality. The President's capacity to remove senior officials at his pleasure is one of those powers.

No one questions Judge Bork's outstanding personal and professional qualifications. The debate is now focused on whether the Senate finds his judicial philosophy congenial. The question before the Senate should be more precisely defined.

The balance of the Supreme Court's jurisprudence has been achieved and maintained for nearly 200 years not only by the vision and example of its leading justices but also by the natural rhythm of the political process. Presidents of different outlook nominate justices they think would share their point of view about the court. Within broad limits, the Senate and the opposition party have recognized the propriety and value of this alternation of impulses in keeping the compass of the Court reasonably close to the moral code of the nation as a whole.

By this standard, Judge Bork's nomination comes well within the zone of discretion the Senate has recognized as properly the President's. For the Senate to insist on more would be to assume the President's power to nominate as well its own power to confirm.

EUGENE V. ROSTOW
Peru, Vt., Aug. 3, 1987

The writer is a visiting research professor of law and diplomacy at the National Defense University's Institute for National Strategic Studies.

ARTHUR OCHS SULZBERGER, *Chairman*
WALTER MATTSON, *President*
DAVID L. GORHAM, *Senior Vice President*
BENJAMIN HANDELMAN, *Senior Vice President*

The **Chairman**. Thank you very much, Dean.

Dean Sandalow.

Mr. **Sandalow**. Mr. Chairman, if I may also begin by correcting the Chairman. I am in the happy state—it may be the happiest state known to man—of being a former dean.

The **Chairman**. I just want you to know I have been presented this witness list by those who asked you to be here, and I was not one of those, although I am delighted you are here. And I apologize.

Mr. **Sandalow**. I have submitted a prepared statement which I assume will be introduced into the record.

The **Chairman**. It will be, the entire statement.

TESTIMONY OF TERRANCE SANDALOW

Mr. **Sandalow**. Thank you. My prepared statement is directed to the two primary issues that have emerged in these hearings. I consider first Judge Bork's qualifications for appointment, with particular attention to somewhat inconsistent claims that he is, on the one hand, a conservative ideologue and, on the other, that the views expressed in his testimony have been acquired merely to obtain confirmation. I think it is demonstrable that both charges are false. The second part of my testimony is devoted to a consideration of Judge Bork's constitutional philosophy. My purpose is to demonstrate both that Judge Bork is in the mainstream of contemporary constitutional thought and that his appointment would be in the national interest.

In the limited time that I am permitted to speak I can address only the first set of issues, but I would be pleased to respond to any questions about his judicial philosophy.

Judge Bork's qualifications for appointment to the Supreme Court—as measured by his professional achievements, by his intellectual background, and by his personal qualities—are as impressive as those of any person nominated during my professional lifetime.

I need not belabor the point because the strength of his qualifications is conceded by those who oppose his appointment. They urge, rather, that the Senate should refuse to confirm him because he is, they claim, a conservative ideologue. They seek to create a picture of a man so imprisoned by a rigid set of ideas that he is unable to perceive the force of opposing ideas or to respond with appropriate openness either to changing social circumstances or to the uniqueness of individual cases. The seriousness of these charges is exceeded only by their absurdity.

The outstanding reputation that Judge Bork enjoys could not have been achieved by someone who conforms to the caricature that these critics have sought to create. Intellectual rigidity is not highly prized by lawyers and legal scholars, and those who are guilty of it do not achieve the professional distinction that Judge Bork has earned during the past 35 years. It is quite simply inconceivable that the American Bar Association would twice have given its highest rating to a man as narrowly dogmatic as the one that Judge Bork's critics have sought to depict.

In many conversations with him over the course of a friendship lasting over 25 years, and through familiarity with his writings, I know Judge Bork to be a vigorous advocate. Vigorous advocacy should not, however, be confused with dogmatism and intellectual rigidity. In my experience, Judge Bork has been entirely open to ideas that differ from his own, indeed eager to elicit them as a way of testing his own ideas.

Once again, it seems unnecessary to belabor the point. The record reveals a number of important instances in which over the years he has altered his views in response to the arguments of others or because of the lessons of experience. These changes, it needs to be emphasized are matters of public record and occurred many years in advance of the current hearings.

The most important test of the critics' claim that Judge Bork is merely an ideologue is whether it is supported by his record on the bench. After reading many of his opinions, I am confident that no fair-minded reader—and, I will add, no responsible one—could conclude that the record supports such a claim, a judgment that is bolstered by an even more comprehensive study of his opinions than I have undertaken.

At the request of the American Bar Association, a group of my colleagues on the University of Michigan Law School faculty, men and women of varying political persuasions and judicial philosophies—some of whom, I may add, do not favor his appointment—studied all of Judge Bork's opinions. Their conclusions, which I quote in brief, were that:

"Judge Bork's opinions are generally well reasoned, balanced in judgment, clearly written, and fair in treatment of the arguments of losing parties and dissenters. And while Judge Bork is widely regarded as a political as well as a judicial conservative, several readers were impressed by his manifest openmindedness and his apparent readiness to make the law and not his personal philosophy his guide to the results."

In brief, far from supporting the charge that he is imprisoned by ideology, the record of Judge Bork's academic and judicial career demonstrates an admirable receptivity to evidence of changing circumstances and to ideas that differ from his own.

As evidence of those qualities has accumulated in these hearings, the critics have shifted their ground, suggesting now that Judge Bork is unprincipled and merely experiencing what has been called a "confirmation conversion." The new charge is as baseless as the original one. The assertion that Judge Bork has altered his views to gain confirmation appears to rest on his testimony concerning freedom of speech and sex discrimination.

With respect to the former, the record is clear that the view he now takes of the first amendment was publicly stated years before the hearings. As far as I know, Judge Bork has not previously articulated in public the position on sex discrimination that he has developed in these hearings. That position is, however, readily inferable from his prior writing.

Even a modest understanding of the state of the law when Judge Bork wrote his now famous 1971 article should enable a reader to understand that he thought the 14th amendment, properly read, prohibits unreasonable classifications. I do not mean to suggest that in 1971 Judge Bork thought classification on the basis of sex was unreasonable. At that time, it must be remembered—though it has not been brought out in the testimony before the committee—the Supreme Court had not yet decided a single case holding sex discrimination impermissible under the 14th amendment. Indeed, it had consistently rejected every such claim that had been made to it.

But the principle on which Judge Bork relied in that article, precisely the same principle—I emphasize, precisely the same principle—that he articulated in his testimony before this committee, is one that would permit application of the clause to sex discrimination as the position of women in American society changed. When those changes occurred, as Judge Bork testified, legal distinctions between men and women that might once have been regarded as justifiable became unreasonable.

The **CHAIRMAN**. Dean, could you summarize, please?

Mr. **SANDALOW**. I am about to summarize right now.

The record thus provides no more foundation for the claim that Judge Bork's testimony is opportunistic than it does for the claim that he is a conservative ideologue. Both assertions are, rather, evidence of the regrettable tendency in recent years for opponents of controversial nominees to seek ways of besmirching the latter's character, rather than resting their case openly and honestly on disagreement with a nominee's judicial philosophy.

I just would like to say a word about that tendency in closing. In yesterday's Washington Post an aide of Senator Biden, discussing the latter's recent difficulties, was quoted as saying: "We were watching the media create a man we didn't know. And there was nothing we could do to change it." Those words capture precisely the feeling of those of us who know Bob Bork. The distortions of his record in the media, in advertisements, and in these hearings has sought to create a public image of a man very different from the one we know and very different from the one that emerges from a fair-minded reading of his record.

Distorted statements of a candidate's record and baseless attacks on his or her integrity and character are distressing when they occur in the political arena. But when they occur there they are expected as part of the rough and tumble of democracy. They are far more troublesome when they intrude upon the selection of judges.

The central justification for an independent judiciary is its capacity to operate at a remove from the passions of politics, its ability to take a longer view than is possible for those who are under pressure from politically powerful interest groups.

One may reasonably doubt whether a judiciary selected in response to the passions and pressures with which we have become familiar during the past 20 years and which particularly have infected the debate over Judge Bork can continue to perform these functions.

Thank you.

The **CHAIRMAN**. Thank you very much.

[The statement of Mr. Sandalow follows:]

Statement of

Terrance Sandalow
Professor of Law, The University of Michigan

on the

Nomination of Judge Robert H. Bork as
Associate Justice of the Supreme Court of the United States

before the

Committee on the Judiciary
United States Senate

September 29, 1987

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I am grateful to the Committee for permitting me to appear in support of the nomination of Judge Robert H. Bork to a seat on the Supreme Court.

My testimony is directed to the two primary issues that have emerged in these hearings. I propose to consider first Judge Bork's qualifications for appointment, with particular attention to the somewhat inconsistent claims that he is, on the one hand, a conservative ideologue whose mind is closed to new ideas and, on the other, that the views expressed in his testimony have been acquired merely to obtain confirmation. I think it is demonstrable that both charges are false. The second part of my testimony is devoted to a consideration of Judge Bork's constitutional philosophy. My purpose is to demonstrate both that Judge Bork is in the mainstream of contemporary constitutional thought and that his appointment would be in the national interest.

Since I am not known to its members, a few preliminary words regarding my background may help the Committee to understand the perspective from which I speak. I have been a professor of law at The University of Michigan since 1966 and served as dean of its Law School from 1978 to 1987. Throughout that period, constitutional law has been one of my scholarly specialties. Prior to joining the Michigan law faculty, I served as a member of the board of the Minnesota Branch of the American Civil Liberties Union and as a member of the Minneapolis Commission on Human Relations. More recently, I co-authored the brief *amicus curiae* submitted by the Association of American Law Schools in the *Bakke* case, a brief that strongly urged the Supreme Court to sustain the validity of minority preferences in university admissions. In my only prior appearance before this Committee that might be considered relevant to the question now before it, I testified in opposition to a proposed constitutional amendment that would have authorized prayer in public schools.

I have known Judge Bork professionally for more than a quarter century. During that time, I have read a great deal that he has written, attended numerous meetings in which he also participated, and discussed a wide range of legal issues with him. On the basis of this rather extensive knowledge of the man and his work, I believe that he is exceptionally well qualified to sit on the Supreme Court. Judge Bork is a man of great intelligence, unusually wide learning, and complete integrity. As his scholarly work and his judicial opinions reveal, he is a highly skilled legal craftsman who has thought deeply about many of the issues that regularly arise in the Court. The professional qualifications, intellectual background, and personal qualities that he would bring to the Court are as impressive as those of any person nominated to the Court during my professional lifetime.

The strength of Judge Bork's qualifications and his stature as a legal scholar and a judge are recognized by his critics as well as his admirers. Some of his critics have urged that the Senate should nevertheless refuse to confirm him because he is, they assert, a conservative ideologue. In so labeling him, they seek to create a picture of a man so imprisoned by a rigid set of ideas that he is unable to perceive the force of opposing ideas or to respond with appropriate openness either to changing social circumstances or to the uniqueness of individual cases. The seriousness of these charges is exceeded only by their absurdity.

The outstanding reputation that Judge Bork enjoys could not have been achieved by someone who conforms to the caricature that these critics have sought to create. Intellectual rigidity is not highly prized by lawyers and legal scholars, and those who are guilty of it do not achieve the distinction that Judge Bork has earned during his years as a member of one of the nation's most distinguished law faculties and as a judge on one of our most prominent appellate courts. It is inconceivable that the American Bar Association's Standing Committee on the Federal Judiciary would have rated "exceptionally well qualified" for appointment to the Court of Appeals and "well qualified" for appointment to the Supreme Court -- the highest possible rating in both instances -- a man as narrowly dogmatic as the one that Judge Bork's critics have sought to depict.

From many conversations with him and through familiarity with his writings, I know Judge Bork to be a vigorous advocate. Vigorous advocacy should not, however, be confused with dogmatism and intellectual rigidity. In my experience, Judge Bork has been entirely open to ideas that differ from his own, indeed, eager to elicit them as a way of continually testing his own ideas. Legal scholars display differing styles as they seek to advance discussion about legal issues. Some tend mainly to ask questions. Others forcefully advocate a position in the hope of eliciting from those who differ with them opposing arguments by which they may test their own ideas. Judge Bork plainly tends toward the latter style, but it is quite wrong to mistake his forceful advocacy of a position with dogmatic adherence to it. The point is admirably illustrated by his frequently cited 1971 Indiana Law Journal article. At the conclusion of the article, following a forceful argument about the proper reach of the first amendment, Judge (then Professor) Bork wrote:

> "These remarks are intended to be tentative and exploratory. Yet at this moment I do not see how I can avoid the conclusions stated." 47 Indiana Law Journal at 35.

The critical words are "at this moment." In later years, in response to arguments made by other lawyers and legal scholars, he significantly modified the position he had taken in the lecture. The openness to opposing points of view that he displayed in this instance, and in others that might be cited, are hardly compatible with the notion that he is an unyielding adherent of a conservative orthodoxy.

The most important test of the critics' claim that Judge Bork is merely an ideologue is whether it is supported by his record on the bench. After reading many of his opinions, I am confident that no fair-minded reader could conclude that the record supports that claim, a judgment that is bolstered by an even more comprehensive study of his opinions than I have undertaken. At the request of the ABA's Standing Committee on the Federal Judiciary, a group of my colleagues on The University of Michigan Law School faculty, men and women of varying political persuasions and judicial philosophies, studied all of Judge Bork's opinions. Their conclusions, as stated by my successor, Dean Lee Bollinger, were that:

> "Judge Bork's opinions are generally well reasoned, balanced in judgment, clearly written and fair in treatment of the arguments of losing parties and dissenters. These positive features are present in areas where Judge Bork may be assumed not to have great expertise as well as in those cases where he has. And, while Judge Bork is widely regarded as a political, as well as a judicial, conservative, several readers were impressed by his manifest open-mindedness and his apparent readiness to make the law, and not his personal philosophy, his guide to results."

In brief, far from supporting the charge that he is imprisoned by ideology, the record of Judge Bork's academic and judicial career demonstrates an admirable receptivity to evidence of changing circumstances and to ideas that differ from his own.

As evidence of those qualities has accumulated in these hearings, the critics have shifted their ground, suggesting now that he is "unprincipled" and merely experiencing a "confirmation conversion." The new charge is as baseless as the original one. Although I have not been able to watch all of Judge Bork's testimony, I have watched a considerable part of it. So far as I can tell, the assertion that he has altered his views to gain confirmation rests upon his testimony regarding his positions concerning freedom of speech and sex discrimination. With respect to the former, the record is clear that the view he now takes of the first amendment, a view significantly different view from that taken in his 1971 Indiana Law Journal article, was publicly stated years before the hearings, at a time when he could not have anticipated personal gain from announcing a change in his position.

As far as I know, Judge Bork has not previously articulated in public the position on sex discrimination that he has developed in these hearings. That position is, however, readily inferable from his prior writing. The claim that, prior to these hearings, he would not have applied the equal protection clause of the 14th amendment to governmental discrimination on the basis of sex stems from a statement in his Indiana Law Journal article that "much more than [a prohibition of racial discrimination] cannot properly be read into the clause." 47 Ind. L.J. at 11. Even a modest understanding of the state of the law when Judge Bork wrote is sufficient to enable a reader to understand that the "something more" he thought could properly be read into the clause is a prohibition of "unreasonable classifications." That interpretation of the clause had been embedded in the law for the better part of a century and Judge Bork's allusion to it is unmistakeable.

I do not mean to suggest that Judge Bork had sex discrimination in mind when he wrote these words. At that time, it must be remembered, the Supreme Court had not yet decided a single case holding sex discrimination impermissible under the 14th amendment; indeed, it had consistently rejected such claims. But the principle Judge Bork undoubtedly had in mind, precisely the same principle that he articulated in his testimony before the Committee, is one that would permit application of the clause to sex discrimination as the position of women in American society changed. When those changes occurred, as Judge Bork testified, legal distinctions between men and women that might once have been regarded as justifiable became unreasonable. The willingness of courts to recognize such changes, as he also testified and as he wrote in his concurring opinion in Ollman v. Evans, 750 F.2d 970, 995-96 (1984), is essential if the values written into the Constitution are to remain a vital force in the governance of the nation.

The record thus provides no more foundation for the claim that Judge Bork's testimony is opportunistic than it does for the contention that he is a conservative ideologue. Both assertions are, rather, evidence of the regrettable tendency in recent years for opponents of controversial nominees to seek ways of besmirching the latter's character rather than resting their case, openly and honestly, on disagrement with a nominee's judicial philosophy. I shall return to that tendency later in my testimony, but I want to consider first the controversy surrounding Judge Bork's judicial philosophy, for it is that philosophy, not his intellectual characteristics or his integrity, which is truly at the heart of the controversy that his nomination has spawned.

For the past twenty-five years, the most significant division among students of constitutional law has been between those who would have courts employ the Constitution as an instrument of social change and those who believe that under the Constitution the task of adapting law to social change belongs to the political branches of government. Judge Bork has for some years been a leading exponent of the latter position. Those who oppose his appointment hold the former view: Impatient with the processes of democratic government, and in the grip of a vision of what America should become, they have turned to the courts to achieve goals they are unable to gain from the Legislature. The consequence has been a prolonged controversy, now extending over a quarter-century, concerning the appropriate role of courts in the governance of the nation, a controversy that has become increasingly intense over time.

The past twenty-five years is not, of course, the first time in our history that the proper role of the courts has been a subject of intense controversy. During the first four decades of this century, "conservatives" typically applauded, while "liberals" generally denounced as usurpations of legislative authority, decisions by the Supreme Court and lower federal courts that declared unconstitutional a great deal of economic legislation aimed at moderating the harshness of an unregulated capitalist system. The Supreme Court's persistence in thwarting economic reform, despite the absence of a solid constitutional foundation for doing so, brought the nation to the brink of a constitutional crisis that was averted only when the Court receded from the doctrines limiting legislative power. President Roosevelt's appointment of justices more sensitive to the claims of democratic government than their predecessors had been finally brought this chapter of the Court's history to a close.

The decisions of the Warren Court, and more recently of the Burger Court, have again put the Supreme Court at the center of national controversy. Though there are important similarities with the controversy surrounding the pre-1940 Court -- in both periods, for example, the Court rested many of its most controversial decisions on the vague formulations of the equal protection and due process clauses -- there are also important differences. The old Court sought to thwart social and economic reform. The controversial decisions of the Warren and Burger years sought, rather, to promote social and political change. In general, the changes that have been decreed are opposed by "conservatives" and favored by "liberals." Not coincidentally, "liberals" and "conservatives" have completely reversed their attitudes toward the Court. Liberals now hail the Court's decisions and, more generally, favor an "activist" judicial stance, while conservatives, who generally decry the decisions, call for the exercise of judicial restraint.

Public discussion of the Supreme Court's decisions and its role is driven primarily by agreement or disagreement with the results it reaches. It proceeds, in other words, as though a judicial decision is no different from a statute. Layman typically judge a constitutional decision to be right or wrong depending on whether they would favor or oppose legislation embodying the same result as the decision. Too many lawyers and (I especially regret to say) legal scholars respond similarly. Thus, opponents of capital punishment applaud, and proponents decry, every constitutional decision that limits the availability of that penalty. With respect to abortion, similarly, "pro-choice" advocates laud, and "pro-life" advocates condemn, every decision that limits state power to control abortions. For those who think of constitutional law and the Supreme Court's role in this way, the question whether to favor or oppose a particular nomination to the Supreme Court depends only upon a judgment about whether the nominee will reach congenial results on issues they regard as salient.

More thoughtful students of American government appreciate the inadequacy of this all-too-common view. The Supreme Court does not sit as the "upper chamber" of a tricameral legislature -- an American House of Lords, so to speak. The Constitution confers "the legislative power" on the Congress, and though it provides for presidential participation in the exercise of that power, it makes no provisions for participation by the courts. Indeed, a proposal to give the Supreme Court a role in framing legislation was specifically rejected by the Constitutional Convention. It follows that constitutional decisions cannot legitimately be made by the courts, or judged by the citizenry, merely by determining whether one or another result would have been congenial if enacted by a legislature.

As a constitutional scholar, Judge Bork's writing has been directed almost entirely toward the problem that most students of the subject have thus come to regard as the central question of constitutional law, determining when courts are justified in invoking the Constitution to invalidate decisions by politically accountable branches of government. His view that courts may legitimately invalidate legislation only when justification for doing so can be found in the language and structure of the Constitution and the intentions of its framers is to be understood in light of the controversy I have briefly recounted over the appropriate role of the judiciary in our national life. It is not, as some have asserted, an expression of political and economic conservatism, but a means by which to implement his belief that in a democracy public policy is properly made by politically responsible officials unless the policy they set violates our constitutional traditions. His record in this respect is too clear to permit any misunderstanding. Thus, though Judge Bork was, throughout his academic career, a vigorous proponent of a free market economy, he has forcefully rejected the argument of some conservative theorists that the Supreme Court should return to the doctrines of an earlier time and constitutionalize _laissez_-_faire_ economic theory. See Bork, The Constitution, Original Intent, and Economic Rights, 23 San Diego L. Rev. 823 (1986). His rejection of that argument rested on precisely the same ground as his rejection of the argument recently made by some academic theorists on the opposite end of the political spectrum, that the Court should read into the Constitution a judicially enforceable right to welfare. See Bork, The Impossibility of Finding Welfare Rights in the Constitution, 1979 Washington University L. Q. 695. In both instances, Judge Bork insisted, courts must leave the decisions where the Constitution has left them, with Congress and the state legislatures.

In taking the position that public policy is properly made by politically responsible officials unless they violate constitutional values, Bork joins justices, both liberal and conservative, who are among the most distinguished figures in the Court's history, including Justice Holmes, Frankfurter, Black, Jackson, and the second Harlan. To be sure, no one of these justices approached the task of constitutional interpretation in precisely the way that Judge Bork does. They wrote at a different time and faced different issues and arguments than he has had to confront. It is, nevertheless, beyond question that, with respect to constitutional philosophy, they are his intellectual ancestors. Only those who fundamentally reject the tradition of judicial restraint with which these justices are associated can regard Judge Bork as "an extremist."

It is here that we reach the heart of the issue that now confronts the Senate. The underlying claim of those who oppose Judge Bork's appointment, reluctant as they may be to own up to it, is that a leading exponent of the tradition of judicial restraint is, precisely because of his constitutional philosophy, unqualified to serve on the Supreme Court. Since that is not a very attractive position to maintain, some of the opponents have attempted to recast the argument, contending that the question is one of "balance." The responsibility of the Senate, they argue, is to assure that the Court is not dominated by the adherents of any one constitutional philosophy. The appointment of an additional adherent of the tradition of judicial restraint, they warn, risks the overruling of many of the most important decisions of the past twenty-five years.

The fear that Judge Bork's appointment would lead to "turning back the clock" is, in my judgment, not merely exaggerated, but belied by his record. As demonstrated most clearly by his record as a judge on the Court of Appeals, Judge Bork is, preeminently, a man of the law. I would not wish to predict how he would vote on any particular issue, but as a lawyer steeped in the traditions of our legal system, he knows that many constitutional decisions that he might not originally have joined are now too embedded in the law and in the understanding of the citizenry to be overruled.

Judge Bork's appointment is likely to have greater impact on the Court's approach to new constitutional issues that it will face in the years ahead. The receptivity of the Supreme Court and lower federal courts to novel claims of constitutional right during the past twenty-five years has led many to suppose that there is a constitutional remedy for nearly every perceived social ill. As a consequence, it can be confidently predicted that in the years ahead the Court will be confronted with a variety of novel constitutional claims seeking to withdraw areas of public policy from legislative control. I have already mentioned the argument that the courts should read a right to welfare benefits into the Constitution. One need only scan the pages of the nation's law reviews to find other novel claims of constitutional right that are likely to reach the Supreme Court in the years ahead.

In assessing the need for the Senate to concern itself with the balance of constitutional philosophies among the justices, it is important to recognize that during the past twenty-five years the Court has employed the Constitution as a vehicle for achieving social change to a greater extent than during any comparable period of our history. The Burger Court was in this respect hardly less active than the Warren Court. Judge Bork's confirmation threatens the balance within the Court only from the perspective of those who wish to perpetuate this judicial displacement of the legislative role as the Court confronts the next generation of constitutional claims. For those who believe that politically responsible agencies of government should bear ultimate responsibility for accommodating law and changing ideas of public policy, Judge Bork's appointment promises to restore the constitutionally established balance among the branches of government.

Even those who believe that the nation was generally well-served by the burst of judicial activism over the past twenty-five years, as in some measure I do, should understand that there are limits to the Court's capacity to play such a role over an extended period. If the Senate is to concern itself with "balance," to put the point somewhat differently, it should recognize that the Court is a continuing institution. Judgments about balance must take account of its performance over time. Concern about prolonged judicial activism tends to focus upon the threat to democratic values when the courts persist in intruding too deeply into the domain of Congress and the state legislatures, but that is not the only danger. A prolonged period of judicial activism also threatens the insulation of judges from politics and, therefore, their ability to discharge the indispensable functions of an independent judiciary. If judges behave as legislators, it is inevitable that they will come to be regarded as political figures both by the public and by those who hold the power of appointment. It is distressingly evident that we have moved far along that path during the past twenty years.

The commission of every Supreme Court Justice recites confidence in his or her "wisdom, uprightness, and learning." In recent years, however, the attention of the public and, even more regrettably, of officials who hold the power of appointment, has been directed less to these qualifications than to the question whether a nominee would reach particular results on issues that "liberals" or "conservatives" have come to regard as a litmus test for judicial appointment. The intensity of emotion generated by these issues has repeatedly led to distorted statements regarding the records of nominees and to baseless attacks upon their characters and their integrity. These are distressing characteristics of political life, but when they occur there they are expected as part of the rough-and-tumble of democracy. They are far more troublesome when they intrude upon the selection of judges. The central justification for an independent judiciary is its capacity to operate at a remove from the passions of politics, its ability to take a longer view than is possible for those who are under pressure from politically powerful interest groups to achieve particular results. One may reasonably doubt whether a judiciary selected in response to the passions and pressures of the moment can continue to perform these functions.

My purpose in calling attention to the quality of recent discussion of judicial appointments is not to criticize the participants, much less to suggest that the partisans on either side are primarily at fault. It is, rather to suggest that these characteristics of public debate over judicial selection are very likely unavoidable if judges remain in the vanguard of social reform, imposing constitutional solutions for controversial political issues even when those solutions lack a foundation in our constitutional traditions. The remedy for the ill-tempered and overheated debates on judicial appointments that we have witnessed over the past twenty years is not futilely to call for more responsible debate, but appropriate restraint in the exercise of judicial power.

Judge Bork's appointment would bring to the Court another voice of restraint, a justice who appreciates that courts must defer to legislative judgment in the absence of a solid constitutional foundation for setting aside that judgment. In light of the concerns that have been expressed over his appointment the last clause of the previous sentence needs to be emphasized no less than the one that precedes it. Judge Bork's testimony in these hearings, and more significantly his record as a judge, make clear that his constitutional philosophy would lead him to enforce vigorously the limits that our constitutional tradition imposes on legislative power. But it would lead him also to defer to Congress and state legislatures when such limits cannot be found in our constitutional tradition. Those who oppose his appointment on the ground that it would "unbalance" the Court should tell us what balance they prefer.

The **Chairman**. The Senator from South Carolina.

Senator **Thurmond**. Thank you, Mr. Chairman.

I want to thank you gentlemen for coming here and testifying. This is about the most impressive panel I have ever seen of lawyers. All able, all distinguished, all dedicated deans of law schools. And I am not going to take up your time and try to go into all these charges that have been made and issues that have been raised. We have spent a lot of time in asking over and over and over again every witness we have to go into every detail about this man.

He testified, Judge Bork testified and that should be what counts. Not something what he said in a magazine article or wrote some 20 years ago. His decisions on the circuit bench is what ought to count. His testimony here is what ought to count. Those are the two things that this committee ought to consider.

But we have had witness after witness. But, anyway, he has written 150 decisions on the circuit bench. He has participated in over 400 decisions. The Supreme Court hasn't overruled a single one.

Now we have had people here like Chief Justice Burger and we have had people like Lloyd Cutler, and yesterday we had a distinguished former Attorney General, Griffin Bell, under President Carter testify from Georgia. We have had presidents of the American Bar Association. I think they had a couple, but we had the rest of them, I believe, in favor of him.

And Chief Justice Burger said, they are calling this man Bork an extremist. He says, if he is an extremist, I am an extremist. I don't know what to make of this thing.

Some of the media has made this man something he is not. In my opinion, this man is a sound judge. He is in the mainstream. I would call him maybe a moderate conservative. He is a little to the right, I think, of right in the middle. Well, what is wrong with that? President Reagan is. He appointed him. The people elected President Reagan. He had a right to appoint people. The people wanted to see this Supreme Court changed somewhat. I don't know if he is going to change it all that much. Maybe he will change it a little bit.

But at any rate, in my opinion he is a sound man. Now I am not going to take up your time and ask a lot of detailed questions. I am going to ask one question, and I wish all of you would answer it.

Do you feel that Judge Bork is equipped by reason of integrity, judicial temperament and professional competence to be a member of the Supreme Court, and does he have the courage and the dedication that man ought to have to be on that Court? That is all that counts, is your opinion. That is the final conclusion that we are going to have to reach. Let us not go into all this detail, contradictory and all those things.

So I am going to start right over here, and if you will call your name and answer that one question. If you think he is qualified, you will say yes. If you don't think he is, you will say no. Give your name and please answer.

Mr. **Frankino**. Steve Frankino. My answer, Senator, is yes.

Mr. **Sandalow**. Terrance Sandalow. An unqualified yes.

Mr. **Holland**. Maury Holland. And yes to I believe both of your questions, Senator.

Mr. **Morgan**. Thomas Morgan. And the answer is yes.

Mr. **Rostow**. Eugene Rostow. Yes, indeed.

Mr. **Davenport**. Ron Davenport. Yes.

Mr. **Casper**. Gerhard Casper. Yes, Senator Thurmond. Now we are all in agreement, but obviously other people are not in agreement. And I think there is a very troublesome question here. Why is there this divergence?

And I would like to point out that, contrary to the celebratory comments which we have heard over the last few weeks, these hearings have not been an unmitigated blessing. They have, indeed, created a fair number of problems. I could tick off one after another.

First of all, this committee's, the witnesses' and many of the Senators' emphasis on results. Results of Supreme Court cases is the only thing that matters. The integrity of judicial reasoning is viewed as irrelevant to those results. That kind of result orientation which summarizes complex cases in one or two words for the evening headlines on television I think has been disastrous.

I think these hearings have had a chilling effect on the legal profession. They have had a chilling effect probably on academics in terms of their writings.

There will indeed be some controversy or articles not written by people who have any ambition. More importantly, perhaps—and I am much more troubled by that. I think these hearings have had a chilling effect on the judiciary, as it has been considered appropriate to go over every footnote of a judge.

I think judges, writing now on the lower courts, will have to worry about what they write there. I think that will have a disastrous effect, Senator Thurmond, on the development of law.

Much of the controversy which takes place in footnotes, and in lower-court opinions, will disappear, or is very likely to disappear.

I do think the very fact that this committee has been setting itself up as the judge of heresy, is not good for the country. What is the range of respectable opinion within which we may differ? Where does heresy begin?

I think the country will have lower respect for the Supreme Court and that will have a disastrous effect on the Supreme Court.

And last, but not least, I think these hearings have encouraged—and that is the reason why you see so much disagreement—a tendency to what I can only call McCarthyite distortions.

Maybe if one charge does not stick, another will. I do not think these hearings are quite as great as is sometimes said these days.

Senator **Thurmond**. Well, I want to thank you, gentlemen. I appreciate the courage you showed in coming here, and the dedication and time that you have exhibited in testifying on this occasion, and I am sure the Committee is very grateful to you.

Thank you very much.

The **Chairman**. The Senator from New Hampshire.

Senator **Humphrey**. Thank you, Mr. Chairman. Before I address a few questions to the panel, I want to correct a misstatement which I made earlier in connection with the quotes from Dean Calabrese of Yale Law School.

I said that they were drawn from an article he published. Indeed, they were drawn from an article written by David Kaplan and

John Riley in the National Law Journal in which article they quoted Judge Calabrese to the effect which I stated.

Dean Casper raises a very troubling observation. I have been troubled by the tenor of the accusations against the nominee, and have been troubled by what I see as a good deal of intellectual dishonesty applied in pursuit of a political, or at least a philosophical agenda.

I am hardly a trained observer of proceedings such as this, but I am very troubled by it. I wonder if we can ask for the perspective of other members of this panel.

How do you think historians will judge these proceedings? What do you think historians will have to say about these proceedings? And I am not suggesting there has been any unfairness. That is not my point at all. Not in terms of the conduct, the chairing of these hearings, but this whole process involving, apparently for the first time, at least on this scale, a massive war between organized special interest groups.

It is mindboggling, what is going on, and I worry very much about the outcome, not only with respect to this nomination, but the process, which has not been perfect in the past, to be sure, but which has been far more objective and stately than it would appear to be in this case.

Dean Sandalow.

Mr. SANDALOW. If I may respond to that. I share concerns that you and Professor Casper have expressed.

Senator HUMPHREY. Let me just interject this before you go on. The meaning of my question is this. My bottom-line question is this: what in the world is going on? How do you explain this?

Mr. SANDALOW. Well, let me begin by saying I share the concerns that you and Professor Casper have expressed. I deplore much of what has happened over the past weeks, but I think it is important to remember that what we have seen over the past several weeks merely continues a trend that has been developing over the past 20 years.

Why is it happening? I think it is happening because it is inevitable that as the Court makes constitutional law that is further and further removed from moorings in either the language of the Constitution or the traditions of our people as they have evolved over the years it will increasingly come to be seen by all segments of the population—I do not mean this as a partisan comment—will come to be seen by all segments of the population as essentially a political actor whose role is no different from that of Members of Congress.

And so the debate——

Senator HUMPHREY. Just another political prize to contest.

Mr. SANDALOW. Sure. And it will be thought that decisions of the Court should be debated in pretty much the same way as decisions of Congress are debated. That is, sometimes what Senators say is distorted. That is common, its politics. You folks are more familiar with that than I am.

People generally do not worry about what the reasons of a Senator are. They ask, is he coming out on the side that they think is right?

That is one of the reasons, in my view—perhaps it is the most important reason—that it is so critical to add to the Court, at this time, another voice of moderate restraint.

Bob Bork deeply believes in the liberties that are written into the Constitution, and his record makes it clear, beyond any doubt, that he would enforce those vigorously. But he would do so with respect for our traditions as a people and with respect for the judgments of democratically elected representatives of the people, perhaps more respect than we have heard from some democratically elected representatives of the people.

Senator HUMPHREY. Dr. Rostow, may I ask you that question, too.

Mr. ROSTOW. Sure.

Senator HUMPHREY. How do you explain this?

Mr. ROSTOW. Well, I share the concerns that have been expressed, and I think certain aspects of this hearing, on the part both of organized groups and the Senators asking questions, and so on, has come very close to the edge of propriety in questioning a Supreme Court nominee, and in dealing with the problem of the Senate's role as compared to the President's role. I tried to bring that out in my prepared statement.

The alternating impulses of American political life are a very healthy thing in trying to keep the Court—with all the courts, but especially the Supreme Court, in closer touch with the moral change in our people.

But I do not think it is quite as novel as you suggest, even with the intervention of television. If you look at some of the battles in the administrations of President Washington and President Adams, and President Jefferson, you see American politics in its riotous rambunctiousness going strong back then.

Thomas Jefferson wanted to find some ground for impeaching John Marshall, for example. And the stuffing of the courts at the end of John Adams' adminstration was not a glorious moment in American political history, except that it gave us John Marshall, and therefore gave us the Constitution.

So I am not quite as alarmed as you. I think the political system created by the Constitution is extremely strong, as I indicated in my prepared remarks, and it will survive and go its own way under the guidance, and within the framework of the values of the Constitution.

That does not mean we should not all practice self-restraint and discipline in the exercise of our respective functions, but it is not as novel as you suggest, and certainly, I think it can be purged, if we all decide to live up to our responsibilities.

Senator HUMPHREY. Thank you. I wish I had more time. This would be an interesting subject for a seminar.

The CHAIRMAN. Thank you. Senator Heflin.

Senator HEFLIN. I do not believe I will ask any questions.

The CHAIRMAN. Gentlemen, thank you very much. I just would like to conclude by indicating that we—it is a tough decision to make for distinguished deans, as yourselves, and 32 other deans who have written the exact opposite opinion. The dean of Harvard Law School, the present dean of Harvard Law School.

The dean of Georgetown University. The dean of Tulane University. The dean of the University of Iowa. The dean of New York University Law School. Thirty-two, who came to an exact opposite conclusion. I do not suspect, Dean Casper, you suggest they are McCarthyite in their objection. I assume you do not do that.

So it is a tough decision. We will listen to all of you.

Mr. **Casper**. May I respond to that, Mr. Chairman?

The **Chairman**. Surely.

Mr. **Casper**. Mr. Chairman, of course I do not suggest that.

My point addressed some of the distinctions and distortions which have happened, in particular, the interest-group type of analyses which have been submitted on Judge Bork's work. That is what concerns me.

The **Chairman**. None of them have testified, though, that I am aware of.

Mr. **Casper**. Well, but much of the material presented to this committee, has been circulated, and, indeed, distortions have appeared in the give and take of this committee, which have been quite aggravating, I have to say.

And I might like to add one word. You suggested earlier, that we have been brought here by the White House. I am here——

The **Chairman**. I did not suggest that. I did not say that.

Mr. **Casper**. Well, it was just the scheduling, Mr. Chairman.

The **Chairman**. I did not say that. Let's get straight what I said.

Mr. **Casper**. Because I am here on my own.

The **Chairman**. Let's get straight what I said.

Mr. **Casper**. All right.

The **Chairman**. I was corrected twice on what schools you each came from, and I have a list presented to me by the minority counsel. The minority counsel listed what schools you came from. That is what I was referring to.

Mr. **Casper**. I am extremely sorry that there are those mistakes.

The **Chairman**. Thank you.

Mr. **Casper**. I just would like to explain, for the record, that I am here on my own——

The **Chairman**. I have no doubt about that.

Mr. **Casper**. And not——

The **Chairman**. I have no doubt about that. I did not impugn your motivation for coming here, and I do not think you should impugn other people's motivations for suggesting that they are opposed to the judge. Thank you. Next panel.

Senator **Specter**. Mr. Chairman, I wonder if I might ask a question.

The **Chairman**. Oh, sure. I did not see you come in. Please.

Senator **Specter**. Thank you.

I regret that I have not been able to be here earlier, but I had a longstanding commitment with a couple hundred Pennsylvanians who were in town this afternoon, and it was made long before the hearings were scheduled. So, I express my regret. I have heard that it is a very distinguished panel of deans and former deans.

Some very good friends of mine are on this panel. My dean, Dean Rostow, from Yale Law School is here, and I have a question which I would like to ask.

Judge Bork has written extensively in a way which is at variance with some of his testimony here today and I will only cite one issue because of the lateness of the hour, and that issue is on the clear-and-present-danger test of the first amendment.

Now he wrote in 1971, that he disagreed with the clear-and-present-danger test, and then he gave a speech at the University of Michigan—the copy I got said either 1977 or 1978—restating his disagreement with the Holmes' clear-and-present-danger test.

And then he gave a speech in 1984 to the Judge Advocate Generals, again raising about the same issue, discussing some cases which he had had, and referring again to *Brandenburg*.

In his testimony here, he said that he would accept the settled law of the *Brandenburg* case, but he immediately said that he disagreed with the philosophy of the *Brandenburg* case.

I then said to him, well, then, you accept *Brandenburg* and *Hess*, and he said, no, I disagree with *Hess*, because he considered *Hess* to be a case involving obscenity. Although the Supreme Court in *Hess* said that *Hess* was a free speech case.

And the question which troubles me, and that I have discussed before, but I would like your views on it, is what assurances are there, in a realistic sense, that a Supreme Court Justice, Judge Bork, if confirmed, who says he does not want to be disgraced by history, and has taken an oath of office, and says he will accept settled law, but disagrees with the principle, and than makes a distinction between *Brandenburg* to *Hess*—what assurances do you see that Judge Bork could do that if confirmed?

And this is only illustrative because there are other issues as well, but I will limit it to just that one issue.

Mr. SANDALOW. I will take a crack at it. I am not certain that——

Senator SPECTER. Fine.

Mr. SANDALOW [continuing]. Anyone can provide you with the sort of assurances that I think you would like to have.

I think one needs to begin with the recognition that in an area like the one that you are raising—the clear-and-present-danger test—the general language of opinions, as you know as a fine lawyer, does not control judges very much.

And therefore, I think that more than layman like to believe the responses of judges are shaped by the facts of particular cases. It is very hard to say exactly how a judge will come out on a case the facts of which he just has not been confronted with yet.

What I think that means is that Judge Bork would approach the case in the same way that any other judge who has a respect for precedent would confront it.

He would look at the case, but he would have to somehow come to terms with his reaction to the facts of the case as well as the pull of prior doctrine.

Senator SPECTER. But there is one additional——

Mr. SANDALOW. No promises.

Senator SPECTER [continuing]. One additional ingredient for Judge Bork, and that is a stated philosophical disagreement, and a very strong one. Judge Bork does not deal in anything less than great strength.

Mr. **Sandalow**. There is one additional point that might be made. I did not see this part of Judge Bork's testimony, and I do not know how intensely he stated his position.

But, you know, the original position he took on this, back in that now famous 1971 article, was closely related to, indeed derived from his view at that time—which he has since abandoned—that the only protected speech was political speech.

Now as that view has changed, I would expect that there is a softening of his view on the advocacy of revolution also, but I——

Senator **Specter**. Dean Sandalow, there has not been. He had changed his view on political speech. He had expanded it some time ago to include scientific and artistic speech, but there has been no softening, as I understand it, on the issue of the clear-and-present-danger test.

Dean Rostow.

Mr. **Rostow**. I will take a crack at it, although I do not want to recite on *Brandenburg* and *Hess* because I have not read them lately. I have been otherwise occupied.

But from time to time, I have worked in the field, of the clear-and-present-danger test and the application of the first amendment, both in itself, and through the 14th amendment. I speak as one with great sympathy for the clear-and-present-danger test, and great admiration for the contribution it has made to the evolution of the law. But it is intangible and difficult to come by, and many judges, and many professors—many judges, in particular, have complained about it and struggled to reformulate it.

It has not been as useful in the field of libel, for example, where first amendment considerations come in, but there, the court has had a tremendous doctrinal struggle to get the law straightened out.

I think what you see here, not only in Judge Bork's opinions and outlook, but also in those of many other people who work actively to try to apply these principles to fact situations which are very different—is that some people draw the line differently between freedom and order, and it is a very good thing that they do.

And that is the true distinction between liberals and conservatives, and it is not an objection to confirming a man, that he would draw the line between freedom and order somewhat differently from the way I do, for example, or you do, or whoever.

I think he does. I think that is one of the few issues in constitutional law in which it makes sense to talk about conservatism and liberalism.

Liberals are more optimistic about human nature and think human beings require less restraint. But I do not think you have seen, in this debate, anything more than the perfectly normal turbulence of doctrinal evolution which you can duplicate in any field, any time—any field that is active, any time.

Mr. **Casper**. May I respond to that? I have read your questioning of Judge Bork in the hearings with great care. First of all, I would like to say that I entirely agree with your statement of the *Brandenburg* case as just being an expression of the clear and present danger test, which it clearly is, although not everybody in the first amendment community would like to see it quite that way. But I think you're entirely right. It is just a tougher formulation of the clear and present danger test.

But I think you should not only accept Judge Bork's word that he will accept *Brandenburg* as law because he has said so, but I do also think that the difference between your view and Judge Bork's view is less pronounced than I think has come out so far, because your disagreement does not really go to the imminence point—that is, to the point that the danger should be imminent as it's formulated in *Brandenburg,* but goes to the fact that Judge Bork, theoretically, and thinking about these matters afresh, would add the gravity of the evil as an important consideration, a position which has been, of course, very well represented in American law by such judges as Learned Hand.

But I do think the difference is not quite as dramatic as I think you have so far felt it is, between your view on the matter and Judge Bork's view.

Senator SPECTER. Thank you very much. My time is up, and we also have a vote on. Our schedules around here are very difficult, which I know you all understand. But I want to join my colleagues in thanking this very distinguished panel for coming, and I want to salute Dean Davenport from Duquesne Law School, ex-Duquesne Law School, and all of you gentlemen for coming here and sharing with us your ideas on this important subject.

Thank you.

The CHAIRMAN. Thank you very much.

The next panel will be Thomas Kauper, James Halverson, Donald Baker, and Phil Areeda. We will adjourn for the 8 or 10 minutes it takes to vote. If the panel would be ready to go when we get back, I would appreciate it.

[The committee was in recess.]

The CHAIRMAN. The hearing will come to order.

Thank you very much for your patience. I apologize for having to leave and vote, and I also apologize for such a distinguished panel coming on at 6:30 in the evening. You're all busy and important men, with a lot to do, and having you wait around for this long is much appreciated.

If you would all stand to be sworn, I would appreciate that also. Do you swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. KAUPER. I do

Mr. BAKER. I do.

Mr. HALVERSON. I do.

Mr. AREEDA. I do.

The CHAIRMAN. Is there an order in which you would like to go?

Mr. AREEDA. Alphabetical. [Laughter.]

The CHAIRMAN. All right. Fire away.

TESTIMONY OF A PANEL CONSISTING OF PHILLIP AREEDA, THOMAS E. KAUPER, JAMES T. HALVERSON, AND DONALD I. BAKER

Mr. **Areeda**. Senator, I am Phillip Areeda, Langdell Professor of Law at Harvard University, where I have taught for over 25 years there, specializing in antitrust law. I have written extensively in that field, including a book widely used for the teaching of the subject, and also a treatise on antitrust law, of which eight volumes have been published so far—with a coauthor on some of them.

I am not here to tell you or anybody else how to vote. My academic expertness gives me no more qualification than any other citizen for that. Nor am I here to defend all of Bob Bork's writings. I don't agree with him on all issues, but then I don't agree with his critics on all issues, either.

I am struck by the fact that much of the criticism of Bob Bork focuses on, and finds particularly objectionable, certain passages in his writings rather than the whole. I am reminded of the Postmaster General, when I worked in Washington in the fifties, who would underline the purple passages in novels and send them over to President Eisenhower to show what a terrible state the country was in—emphasizing the purple passages and ignoring all the rest of the book.

The additional problem is that some of the critics of Bob Bork's writings seem to demand adherence to a particular set of views as a qualification for appointment to the Court. Those critics bless their own views as the mainstream and damn everyone else as outside of it.

Bob Bork is clearly within the mainstream of American antitrust law, and I would like to define that mainstream. It can fairly be defined as a belief that the primary purpose of our antitrust laws is to promote competition so as to realize its benefits—the benefits of better products produced in better ways, and sold to consumers at competitive prices, without monopoly profits or private price fixing by firms that ought to compete. Bob Bork is fully committed to that mainstream, as his writings amply demonstrate.

Some of those who criticize Bork say that he has a narrow view that the antitrust laws protect only economic efficiency rather than some broader values. I would like to put those vague abstractions on one side and bring the academic dispute down to Earth. The central question is whether the antitrust laws should protect inefficient producers at the expense of American consumers, and Bork's writings give a negative answer to that question, as indeed they should.

Among the criticisms, including the criticism in documents circulated by the committee, there is a tendency to fault Bork for criticizing the Supreme Court decision in one case or another, or criticizing the wisdom of a statute in one situation or another. But criticism is not only desirable and essential, it is often justified.

For example, one of the cases that Bork is faulted for criticizing is the *Brown Shoe* merger decision of the Supreme Court. That was a merger of two firms accounting for about 4 percent of shoe production, and one of which accounted for about 2 percent of national shoe sales. The Court gave as one of the reasons for condemning the merger that the merged American companies would get shoes to the American people more cheaply. Well, I think Bob Bork was entirely right to criticize the Court for that, and I have not heard those who fault him for doing so explain why it is that American consumers should be forced by antitrust law to pay higher prices for shoes.

Many of the older antitrust cases that Bork has criticized rested on an assumption that may once have been valid—namely, that progress in the economy was inevitable and that U.S. industry was far ahead of the rest of the world. Those assumptions are no longer valid. Efficiency has to be won, and great care is necessary to keep antitrust law and other regulations from unduly interfering with it.

To stay well within my 5 minutes, let me conclude. First, Bob Bork is committed to the mainstream antitrust values of protecting consumers. Second, he is intelligent and energetic and brings a strong and penetrating mind to the analysis of antitrust problems. Third, he has the capacity, always required in the law, to penetrate beneath the assertions and doubletalk of lawyers in antitrust suits, to get down to the real issue of what harms or benefits consumers.

I disagree with a number of his academic positions, but I have confidence in the give and take among the nine members of the Court where vigorous internal debate is our best assurance of sound decisions.

Thank you.

The CHAIRMAN. Thank you very much, Professor.

Mr. Donald Baker is a partner in a prestigious Washington law firm and I believe a former Assistant Attorney General in the Antitrust Division.

Mr. BAKER. Thank you, Mr. Chairman. I am honored to be here with my distinguished colleagues. I am also a former professor, which I don't know if it helps or hurts in this environment.

The CHAIRMAN. It always helps.

TESTIMONY OF DONALD I. BAKER

Mr. BAKER. In a sense, I am surprised to be here supporting Judge Bork's nomination. I was not a fan of Professor Bork's early antitrust writings, and I was disappointed when he was named Solicitor General in 1972.

I have since changed my mind. Why did I do it? First, I was exposed firsthand to Robert Bork as Solicitor General. I found him an impressively thoughtful person. He brought originality and insight, sheer intellectual power, to difficult situations. Second, I became more impressed with the insight in many of his antitrust writings as I got to know them better as a Cornell professor and practicing lawyer. Thoughtfulness, candor and intellectual firepower are definitely what I want in a Supreme Court Justice. That is why I'm here today.

I believe today, as I did in 1972, in clear antitrust rules and effective antitrust enforcement. I would not be testifying here today as an antitrust witness unless I felt that Judge Bork's elevation to the Supreme Court would promote the cause of effective antitrust law.

To state it that way is to vastly understate it. Robert Bork has been one of the keenest antitrust minds of our time. He would bring extra insight to the Supreme Court deliberations on antitrust questions. His insight would help on both the crucial cert determinations of which cases to take and on the clarity of particular decisions. He would not fail to see issues lurking beneath the surface nor, I suspect, be too modest to call them to the attention of his brethren.

In my prepared statement, which I would like included in the record, I touch upon several areas of antitrust law in which I think he has been a particularly forceful, useful, and pro-antitrust person.

The first one involves joint ventures, in which he has generally advocated using the fact-based rule of reason rather than per se prohibitions. He did this in "The Antitrust Paradox," it was followed by the Supreme Court in the series of cases, and he himself followed it in an important 1986 decision called *Rothery Moving & Storage against Allied Van Lines,* which I think is my candidate for the best antitrust case of 1986.

It is criticized by the committee staff work as a big business kind of case, which makes me want to say something that comes out of my own experience of counseling in this area, and particularly counseling joint ventures.

A broad joint venture is something which is often of greater value to its small members than its large ones, because the larger member has a better chance of doing it on its own. At the same time, a broad joint venture, at least the kind of joint ventures I represent, are frequently subject to what I will call "antitrust bullying," threats of antitrust litigation or antitrust litigation designed to prevent the venture from doing what the opponent wants.

Note in the *NCAA* football case that it was not a bunch of small colleges that brought the antitrust case to block what they were doing; it was two of the largest football powers. That, Mr. Chairman, is the kind of thing that is repeated in other areas.

Bork's contribution of clarity and flexibility, and some degree of comfort, of the antitrust rules in the joint venture area is really important to the smaller members of my clients as well as the large ones.

The second area which I touch on in the statement is what in the trade is called "sham litigation," or what Bork calls in Chapter 18, which is brilliant, "predation through governmental processes." He deals here with something that is all too similar and lamentable here in Washington: the established competitor of a group desiring to prevent or forestall entry, rolls out opposition, with or without cause, to any new competitor, using courts and regulatory agencies.

Bork says some intelligent things and applies some intelligent analysis and looks at it in a way that offers a wider use of the antitrust laws. I quote some of his more thoughtful prose in my statement, where I will leave it. But it's a very sharp mind and a very constructive one.

The third area that I mention about Bork comes more out of his role as Solicitor General, indeed, at a time when both Professor Kauper and I were in the Antitrust Division. There he was very much a leader in rolling back what was known as the "state action" exemption. This was an ill-defined exemption which allowed a lot of private cartel activity under the sort of gauzy cloak of the state.

The chance for the Antitrust Division and the Solicitor General came in a case called *Goldfarb against Virginia State Bar*, which was, incidentally, brought by Ralph Nader's litigation group. The Department of Justice supported Nader's group in the Supreme Court and got it reversed. Bob Bork argued the case himself with great vigor. And in the next case that came up, which was called *Cantor* v. *Detroit Edison*, he also argued with great vigor, but I enjoyed it less because by this time I was out and counsel to the losing party, although I think he was probably right.

Let me conclude with several quick, general thoughts. I think Judge Bork has the reputation in some quarters of being anti-antitrust, a reputation which he helped create with his sharply barbed phrases in "The Antitrust Paradox." In that book he puts his finger clearly on the uneasy balance of values which mostly lies between the surface of the antitrust laws, between what Justice Powell has called "competition based on efficiency," and what Justice Peckham many years ago called the protection of "smaller dealers and worthy men."

Professor Bork has come down squarely on the side of "competitive efficiency." So has the modern Supreme Court. It is competition, not competitors, said the Court—indeed, said Justice Marshall, a liberal member of the Court.

Now, what I'm saying here is not completely new to me. In 1978 I wrote a short review of "The Antitrust Paradox" in the New York Law Journal. I have managed to retrieve a copy from a microfilm library and attach it to my statement for the committee's use. I mention the microfilm library because that is why it's such a crummy copy.

Note my last paragraph, which begins "Probably the people who may most need Bork are the ones that are least likely to read him." I hope that's not true today.

Of course, there is no antitrust seat on the Supreme Court, however charming that might be to some of us. Robert Bork is not here before this committee just because he is a good antitrust lawyer. He is here because he is an extraordinarily good lawyer who just happens to have heavily used his analytical skills in the antitrust area. He is definitely in the now familiar "mainstream" of antitrust, if that means his antitrust thinking—both as Professor and Judge—is widely used by antitrust practitioners, antitrust courts, and even antitrust professors. He is not in the mainstream if that means "average" or "economically larded dullness."

In sum, his antitrust work clearly supports the case for his confirmation.

Thank you very much, Mr. Chairman.

[The prepared statement of Donald I. Baker follows:]

STATEMENT ON ANTITRUST ISSUES

BY

DONALD I. BAKER
Washington, D.C.

CONCERNING THE
NOMINATION OF
THE HONORABLE ROBERT H. BORK

Before the
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

September 29, 1987

I am surprised to be here supporting Judge Bork's nomination. I was not a fan of Professor Bork's early antitrust writings and I was disappointed when he was named Solicitor General in late 1972.

I have since changed my mind. Why did I do it? First, I was exposed first hand to Robert Bork as Solicitor General. I found him an impressively thoughtful person; he brought originality and insight -- sheer intellectual power -- to difficult situations. Secondly, I became more impressed with the insight in many of his antitrust writings as I got to know them better as a Cornell professor and practicing lawyer. Thoughtfulness, candor and intellectual firepower are definitely what I want in a Supreme Court Justice. That is why I am here today.

* * *

I believe today, as I did in 1972, in clear antitrust rules and effective antitrust enforcement. I have freely criticized the Reagan Administration (and its predecessor) when I thought they were not meeting these goals (and have sometimes been invited up to Capitol Hill to air my dissents.*/ I would not be testifying here today, as an antitrust witness, unless I felt that Judge Bork's elevation to the Supreme Court would promote the cause of effective antitrust law.

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*/ The last time I testified on Capitol Hill was on February 26, 1987, when I presented a critique of the Administration's proposed Antitrust Division budget before the House Judiciary Committee. The last time I was asked to testify before this Committee was in 1985, concerning my article criticizing the Departments of Transportation and Justice for their handling of the Norfolk-Southern-Conrail merger. "Sale of Conrail Is Latest Chapter In Sad History of Railroad Mergers", National Law Journal, April 22, 1985.

To state it that way is vastly to understate it: Robert Bork has been one of the keenest antitrust minds of our time. He would bring extra insight to the Supreme Court deliberations on antitrust questions. His insight could help on both the crucial cert. petition selection process and on the clarity of particular decisions. He would not fail to see issues lurking beneath the surface nor, I suspect, be too modest to call them to the attention of their brethen.

* * *

Let me try to be specific. I want to focus on a few particular areas.

1. Joint Ventures. Professor Bork expressed serious concern from very early on about the application of per se rules to the activities of joint ventures. He saw a joint venture as potentially (but not always) creating a product, services, or facility which the members could not do individually. He saw joint ventures as potentially (but not always) subject to centrifugal forces and free riding. He also saw joint ventures as capable of potentially (but not always) of engaging in predatory

exclusion from joint facilities. This led him in The Antitrust Paradox to criticize the rote invocation of per se Sherman Act doctrine in such cases as Sealy, Topco, and Fashion Originators Guild. Rather he argued, especially in Chapter 13, that the antitrust court actually had to look at the facts and see what was going on in the particular case.

The Supreme Court followed Bork's lead in its Broadcast Music decision in 1979, its NCAA decision in 1984, and its Northwest Wholesalers decision in 1985 -- citing The Antitrust Paradox in NCAA.*/ Each involved a joint venture. Each resulted in a rule of reason decision -- two going for the joint venture, NCAA against it.

Judge Bork meanwhile following his own teaching last year in Rothery Moving & Storage Co. v. Allied Van Lines -- my candidate for the best antitrust decision of 1986, and certainly the most useful antitrust decision in the joint venture field. Judge Bork (writing for himself, Chief Judge Wald, and Judge Ruth Bader Ginsburg) treated the Allied system as a joint undertaking between Allied and its agents. (Plaintiffs' also treated it as a joint undertaking, but called it a per se "boycott".) Judge Bork found that (1) "free riding" was a significant problem; (2) the system rule designed to combat the problem was an ancillary restraint entitled to rule of reason treatment; and (3) it passed muster in part because of the Allied system's market share was only 6% nationally. Judge Bork's decision rested heavily on Broadcast Music, NCAA, and Northwest Wholesalers -- which seems fitting because those three decisions had been so clearly influenced by Professor Bork's analysis in The Antitrust Paradox.

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*/ National Collegiate Athletic Assn. v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 101 (1984).

Let me make one point which is drawn from my extensive work for joint ventures, principally (but not exclusively) in the banking area. A broad joint venture is something which is often of greater value to small members than large ones, because the larger member has a better chance of achieving at least part of its goals on its own. At the same time, a broad joint venture is frequently subject to what I shall call "antitrust bullying" by a large member -- in other words antitrust litigation or more often litigation threats designed to prevent the joint venture from doing what the large member opposes. Note that it was not small colleges -- but two major football universities -- which brought the antitrust case against NCAA. Thus joint ventures (and their smaller members in particular) have much to gain from the type of clarity Robert Bork has helped to bring to this area of law. It also brings me to my next subject.

2. Sham Litigation. Chapter 18 of The Antitrust Paradox is simply brilliant. Entitled "Predation Through Governmental Processes," it deals with something which is all too familiar (and lamentable) here in Washington. The established competitor or group desiring to thwart (or at least delay) new entry resorts to the regulatory process and the courts as a way of achieving this goal -- Professor Bork explains why such predatory tactics are so effective economically. He then builds on the Supreme Court's 1976 decision in California Motor Transport v. Trucking Unlimited to suggest a broader attack on these abuses. He writes (at pp. 355-356):

> Cases involving attempts to invoke governmental processes necessarily implicate profound values of a democratic system of government.... There is the need, as Noerr fully recognized, that citizens have the widest latitude in bringing their views, information, and desires to the attention of their representatives.... But there is also the correlative need that government be able to protect the integrity of its processes, that it be able to punish those who would abuse them....
>
> Because there is a degree of tension between these constitutional values, the cases involving attempts

> to use governmental processes for private gain will lie along a spectrum from the completely punishable to the completely immune. To lump all cases under either category would deny the needs of government and the values protected by our Constitution. A number of considerations seem proper in placing various situations on the spectrum and determining the liability or immunity of those who misuse governmental procedures. I can offer no single bright line that disposes easily of all cases, dropping them neatly into one category or the other. Reflection suggests that no such line exists. But the factors that do control are sufficient to offer the degree of certainty and predictability the field requires.

This is very important. Note the thoughtful and balanced style. "Sham" litigation is not an issue on which Bork has apparently had a chance to write as a Judge. I hope he would have a chance as a Justice.

3. "State Action" Exemption. As Solicitor General, Robert Bork was a real leader in the Justice Department effort to roll back the open-ended "state action" exemption which had originally been announced in Parker v. Brown thirty years earlier. This ill-defined exemption had allowed a great deal of private cartel activity to go on under what Justice Powell was later to label the "gauzy cloak" of state immunity. The chance for the Antitrust Division and the Solicitor General came in Goldfarb v. Virginia State Bar -- a landmark case, brought

by Ralph Nader's litigation group, challenging fee fixing by local Virginia lawyers. The United States as amicus weighed in on the plaintiff's side and secured a unanimous reversal of a Fourth Circuit holding of immunity. Solicitor General Bork argued the case himself, in his own vigorous style. He did the same thing less than two years later in Cantor v. Detroit Edison -- and won again, but only by a plurality. (By this time I was out of the government -- temporarily -- and was counsel for the defendant in the case. I know all too well how good the Solicitor General was!)

4. Antitrust Exemptions Generally. The Supreme Court has been generally strong, but not always consistent, in maintaining the general position that exemptions from the antitrust laws are not to be lightly implied from the passage of other subsequent federal legislation. The required analysis in each case generally starts with some ambiguous legislative history, and then turns to a hard-boiled analysis of the operative needs of the other legislative scheme. As Solicitor General, Robert Bork worked hard to help the Antitrust Division avoid claims of implied exemption (even though we were not successful in all the cases). I would expect a Justice Bork to look skeptically on implied exemption claims by cartel managers and monopolists -- and require careful and persuasive showing

of operative need before finding an implied exemption from otherwise ambiguous legislative history. In this respect, he would probably be more likely than Justice Powell was to find no exemption in a particular case.*/

* * *

Let me conclude with a couple of general thoughts.

Judge Bork has had a reputation in some quarters as being "anti-antitrust" -- a reputation which he has helped create with some sharply barbed phrases made in *The Antitrust Paradox* and elsewhere. In that book he puts his finger clearly on the uneasy balance of values which (mostly) lies beneath the surface of the antitrust laws -- a balance between "competition based on efficiency" (as Justice Powell has labelled it) and the protection of "smaller dealers and worthy men" (to borrow Justice Peckham's phrase from an early case). Professor Bork has come down squarely on the side of "competitive efficiency". So has the modern Supreme Court. Thus, in *Brunswick Corp. v. Pueblo Bowl-O-Mat*, the unanimous court (with Justice Marshall writing) stressed a much-repeated message that it is "*competition*, not *competitors* which the

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*/ Justice Powell's decision in *United States v. National Assn. of Securities Dealers*, 422 U.S. 694 (1975) has always been one of my least favorite decisions. Solicitor General Bork autorized the government's appeal in that case, over the opposition of the SEC.

antitrust laws protect." Most of the leading commentators, join in this chorus, as you can infer from this panel here today.

What I am saying here is not completely new with me. In 1978, I wrote a short review of The Antitrust Paradox for the New York Law Journal. I have managed to retrieve a copy from a microfilm library and I attach it for the Committee's use. Note my last paragraph which begins: "Probably the people who may most need Bork are the ones least likely to read him." That may still be true today.

Of course there is no "antitrust seat" on the Supreme Court (however charming that thought might seem to some of us). Robert Bork is not here before this Committee just because he is a good antitrust lawyer. He is here because he is an extraordinarily good lawyer who just happens to have heavily used his analytical skills in the antitrust area. He is definitely in the now-familiar "mainstream" of antitrust, if that means his antitrust thinking (both as Professor and Judge) is widely used by antitrust practitioners, antitrust courts, and even antitrust professors. He is not in the mainstream if that means "average" or "economically-larded dullness".

In sum, his antitrust work clearly supports the case for Judge Bork's confirmation.

NEW YORK LAW JOURNAL—Friday, July 7, 1978 p. 2

THE LAWYER'S BOOKSHELF

THE ANTITRUST PARADOX. By Robert H. Bork. Basic Books, New York, N.Y., 1978. 462 pages. $18.

Reviewed by
Donald I. Baker

Professor Robert Bork has long been known as a trenchant and articulate critic of modern antitrust law and its enforcement. Shivers ran through the staff of the Justice Department's Antitrust Division back in December, 1972, when it was rumored that he would be named Assistant Attorney General for Antitrust in the post-election purge at the Department of Justice. (In fact, he was named Solicitor General.)

Bork lives up to his previews in *The Antitrust Paradox* — which is sub-titled "A Policy at War with Itself." Today, he finds "antitrust is less a discipline than a buzzing confusion of unrelated opinion" (p. 116) and "has so decayed that the policy is no longer intellectually respectable" (p. 418). Still elsewhere, he says, "It is both startling and discouraging to realize that, in view of what came later, the *Addyston* opinion of 1898 may well have been the high-water mark of rational antitrust doctrine." (p. 30).

Will Upset Many

This clear and forceful book will make government antitrust enforcers uncomfortable — but the discomfort Bork causes will extend to judges, politicians and antitrust practitioners as well. Believing that intellectual discomfort is a personal good and a catalyst to public progress, I recommend *The Antitrust Paradox* to all whom Bork would make uncomfortable — even though I dissent from at least some of what he says.

Bork's central thesis is clear: antitrust law is concerned *only* with promoting consumer welfare, and therefore antitrust enforcement should be confined to stopping (1) agreements among competitors to control price or output, (2) very large mergers among direct competitors, and (3) some very limited types of predatory practices. For Bork, antitrust should *never* be used for any Brandeisian purpose of protecting the opportunities for businesses because they are "small," "local" or otherwise worthy in populist eyes. He regards antitrust enforcement against customer-supplier mergers and conglomerate mergers as expensive nonsense; antitrust enforcement against manufacturer imposed restrictions on dealers as wholly misguided; antitrust enforcement against tie-ins, requirements contracts and price discriminations as a misguided attempt to provide special protection to the inefficient; and current antitrust enforcement against monopolies and "shared monopolies" as attempts to punish successful firms for being successful.

Bork's economic thinking comes from the "Chicago school" — which is not concerned about the oligopoly problems which worry today's antitrust enforcers and many non-Chicagoan economists. His political philosophy is conservative, which causes him to want a narrower and less active law-making role for the courts than Congress would seem to have intended when it enacted the very open-ended antitrust statutes.

To some extent, Bork is flailing at ghosts of the past, albeit a past of only a decade or so ago. Many of the ideas that he and other similarly-minded thinkers have espoused have already had a substantial influence on a generation of public prosecutors and the current majority on the Supreme Court. For example, the Antitrust Division takes economics very seriously. It now devotes the largest part of its enforcement resources to price-fixing agreements among competitors (which Bork would say was good) and almost never brings a case against a tie-in or manufacturer-dealer distribution restraints (which Bork would also applaud). The Antitrust Division has been at least as critical as Bork's Chapter 20 about the pernicious effects on competition of the protectionist Robinson-Patman Price Discrimination Act. Even the Federal Trade Commission, which has usually been more populist than the Antitrust Division, has diverted almost all its enforcement resources away from the Robinson-Patman Act. Both agencies have built up substantial staffs of economists, headed in recent years by a number of highly respected (but admittedly non-Chicago) academic economists. Aided by this new capability, both agencies do make their enforcement decisions generally in terms of consumer welfare as they perceive it.

The largest gap between what Bork argues for and what the government is doing is surely in the area of corporate mergers. Bork sees most anti-merger enforcement under Section 7 of the Clayton Act as an attempt to interfere with management's judgment as to the best way to assemble productive assets, and therefore as presumptively inefficient.

Private antitrust practitioners ought to read *The Antitrust Paradox* because it offers them clearly written arguments for cutting back on antitrust enforcement, and because this discussion of some key case law — especially the early case law — is exceptionally illuminating. But there is another reason. Bork is very forceful in criticizing the private Bar for inadequacies of its advocacy, for arguing antitrust cases in mindlessly technical way.

Government prosecutors ought to read this book because they, above all other parties, ought to be concerned with business efficiency and consumer welfare. Prosecutors must be able to defend themselves rationally against Bork's charge that, ". . . in modern times, [illegible] in earlier antitrust history, the government has, more often than not, represented the anti-free market position and the defendant the free market position" (p. 418) — or they ought to change their ways. Public agencies have no business using the public's funds to mindlessly enforce old rules if these hurt consumers by penalizing business efficiency, and Bork's book asks a lot of hard questions against this standard, even for those who would not characterize consumer welfare quite so narrowly as his Chicago school teaching would cause him to do.

In particular, his thoughtful chapter (13) on cooperation among competitors invites government agencies to re-think what they have done in striking down as naked restraints what are essentially ancillary restraints in support of useful joint venture and partnership agreements. Finally, government prosecutors should find helpful Bork's excellent Chapter 18 dealing with "Predation through Governmental Processes" — where he suggests a more precise antitrust rule against established competitors' use of the administrative and judicial processes to thwart new entry and commercial innovation from new rivals.

Probably the people who may most need Bork are the ones that are least likely to read him. These include the private litigants who seem to keep the courts busy with what are often wholly intellectually disrespectable cases, by relying on theories of law that have precious little — if anything — to do with consumer welfare. I am sorry that Bork did not turn his critical pen to those often-exalted "private [illegible]" who have often [illegible] government in [illegible] antitrust law that he abhors. He might at least have asked whether *treble* damages is not an excessive subsidy for anything but "hard core" Sherman Act violations.

Donald I. Baker, a former chief of the Antitrust Division, Department of Justice, is of counsel to the Washington, D.C., law firm of Jones, Day, Reavis & Pogue.

The CHAIRMAN. Thank you very much.

Our next witness is Mr. James Halverson, a partner in the law firm of Shearman & Sterling, and former chairman of the antitrust section of the American Bar Association. Welcome, Mr. Halverson. It's a pleasure to have you here.

TESTIMONY OF JAMES T. HALVERSON

Mr. HALVERSON. Thank you, Mr. Chairman.

I might add that, since I am a former chairman of the section on antitrust law of the ABA, I am required to say that I speak only for myself. The ABA, as you know, has already spoken on this subject.

I am very honored to appear today to support the nomination Judge Robert Bork for Associate Justice of the Supreme Court of the United States. In doing so, I draw on my 22 years of experience in antitrust litigation and advisory work, including 2 years, from 1973 to 1975, as Director of the Bureau of Competition at the Federal Trade Commission, where I wasn't exactly known as a "nonactive" prosecutor.

I have known Judge Bork since my days in the Government in the early 1970's and had a number of pleasurable experiences in discussing antitrust issues with him since then.

In reflecting on the criticisms leveled at the extraordinary scholarly work done by Judge Bork in the field of antitrust, it is difficult for me to comprehend how knowledgeable people could take issue with Judge Bork's significant contributions to the improvement of our understanding of how antitrust laws were originally intended to be enforced in the interest of enhancing consumer welfare. Judge Bork's writings within the antitrust area have been among the most influential and scholarly ever produced. His book, "The Antitrust Paradox," which he published in 1978, is perhaps the most important single work in this field in the past 25 years.

I might add that the other multivolume treatise of great significance in this period, in my view, is that of Professor Areeda, sitting next to me.

Consistently, since his "Separate Statement" dissenting from the "Report of the White House Task Force on Antitrust Policy" in 1968—that's almost 20 years ago—then Professor, now Judge Bork, has stressed that consumer welfare is the intended goal of the antitrust laws and that that welfare is best promoted by allowing American firms to enhance their efficiency through intensely competitive activity which increases consumer welfare by increasing firm output. Active and intense competition which increases output and lowers price for the American consumer is to be encouraged even if some inefficient firms suffer in the process.

That is a lesson that some of us who practiced antitrust have learned from reading Professor Bork.

Although the brilliance of Judge Bork's analysis is most evident in "The Antitrust Paradox," it is important to remember that in his 1968 dissent from the White House Task Force Report he objected strenuously to the proposal for a "Concentrated Industries Act" which would have deconcentrated basic American industries on the basis of nothing more than disputed economic studies purporting to show a correlation between industry concentration and profitability.

In my statement, Mr. Chairman, which I ask to be included in the record, I do quote from his dissent, which I think is a valuable contribution to the literature.

The **Chairman**. Your entire statement will be put in the record.

Mr. **Halverson**. As any student of antitrust will remember, there was a period in the history of U.S. antitrust enforcement during which cases were brought on the basis of an assumption, now overwhelmingly thought to be invalid, that somehow an industry's moderate to high level of concentration and higher than average profitability, whatever that meant, were bad for the American consumer. In fact, had this nation succeeded in a program of deconcentrating its most important industries in the early 1970's, it would have faced even more severe economic problems in confronting growing and rapidly developing world markets and industry structures throughout the 1970s and the 1980s.

Judge Bork's 1978 book, "The Antitrust Paradox," has had an extraordinary influence in the refinement by the Supreme Court of its views in a number of antitrust cases. Since its publication, this outstanding work has been cited approvingly in six majority opinions written by Justices commonly viewed as having widely varying judicial philosophies: Justice Brennan in the *Cargill* case in 1986, Justice Powell in the *Matsushita* case in 1986, Justice Stevens in the *Aspen Skiing* case in 1985, and in the *NCAA* case in 1984, and Chief Justice Burger in two 1987 cases, *Reiter* v. *Sonotone* and *United States* v. *United States Gypsum Co.*

Justice O'Connor cited Judge Bork's book in her 1984 concurring opinion, which is highly thought of, in the *Jefferson Parish* case, as did Justice Blackman in his 1978 dissent in the *National Society of Professional Engineers* case.

Indeed, for those who criticize Judge Bork as not being in the mainstream, it should be noted that every member of the present Supreme Court joined one or another of these opinions.

As I have said in an earlier letter to the editor of the Washington Post, the fact that six of the nine present Justices have cited Judge Bork's book, and that all of them have joined opinions citing it, demonstrates clearly to me at least that the claims of Judge Bork's critics that his antitrust views are not in the mainstream or somehow extreme are just plain wrong.

Judge Bork's critics are also quite wrong in suggesting that Judge Bork's antitrust writings are anticonsumer. To the contrary, the central thesis of Judge Bork's book, as I pointed out, and as I have quoted in my statement, is a maximization of consumer welfare.

It is true that Judge Bork has also stressed that the protection of consumer welfare is sometimes inconsistent with the protection of some businesses from legitimate competition. There key point here, however, is that Judge Bork advocates pro-competitive policies which promote the very efficiency that makes the enhancement of consumer welfare possible.

Therefore, in my view, it is Judge Bork's critics and not Judge Bork who are out of touch with the center of legitimate judicial and economic thought about the proper direction of antitrust analysis.

As I said in my earlier letter, the mainstream view, which no one has helped promote more than Judge Bork, is that the proper antitrust policy is one which encourages strong private and government action to promote consumer welfare, rather than unnecessary government intervention to protect politically favored competitors.

Thank you very much.

[The prepared statement of James T. Halverson follows:]

STATEMENT OF JAMES T. HALVERSON
SHEARMAN & STERLING, NEW YORK, N.Y.
BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

IN SUPPORT OF THE NOMINATION OF
ROBERT H. BORK
AS ASSOCIATE JUSTICE OF
THE SUPREME COURT OF THE UNITED STATES

September 29, 1987

Mr. Chairman and members of the Committee, I am honored to appear today to support the nomination of Judge Robert H. Bork for Associate Justice of the Supreme Court of the United States. In doing so, I draw on my twenty-two years of experience in antitrust litigation and advisory work, including two years (1973-75) as Director of the Bureau of Competition at the Federal Trade Commission.

In reflecting on the criticisms leveled at the extraordinary scholarly work done by Judge Bork in the field of antitrust, it is difficult for me to comprehend how anyone could take issue with Judge Bork's significant contributions to the improvement of our understanding of how the antitrust laws were originally intended to be enforced in the interest of enhancing consumer welfare. Judge Bork's writings within the antitrust area have been among the most influential and scholarly ever produced. His book, The Antitrust Paradox,[1] which he published in 1978, is perhaps the most important single work written in this field in the past twenty-five years.

Consistently, since his "Separate Statement" dissenting from the Report of the White House Task Force on Antitrust

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[1] R. Bork, The Antitrust Paradox (1978)

Policy in 1968[2], then Professor (now Judge) Bork has stressed that consumer welfare is the intended goal of the antitrust laws and that that welfare is best promoted by allowing American firms to enhance their efficiency through intensely competitive activity which increases consumer welfare by increasing firm output. Active and intense competition which increases output and lowers price for the American consumer is to be encouraged even if some inefficient firms suffer in the process.

Although the brilliance of Judge Bork's analysis is most evident in The Antitrust Paradox, it is important to remember that in his 1968 dissent from the White House Task Force Report, he objected strenuously to the proposal for a "Concentrated Industries Act" which would have deconcentrated basic American industries on the basis of nothing more than disputed economic studies purporting to show a correlation between industry concentration and profitability. As then Professor Bork said in 1968:

> The dissolution of such firms would be a disservice to consumers and to national strength. When firms grow to sizes that create concentration or when such a structure is created by merger and persists for many years, there is a very strong *prima facie* case that the firms' sizes are related to efficiency. By efficiency I mean 'competitive effectiveness' within

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[2] Separate statement of Robert H. Bork, Report of the White House Task Force on Antitrust Policy, 2 J.L. & Econ. Rev. 53 (1968-69). (Hereinafter "Separate Statement").

> the bounds of the law, and competitive effectiveness means service to consumers. If the leading firms in a concentrated industry are restricting their output in order to obtain prices above the competitive level, their efficiencies must be sufficiently superior to that of all actual and potential rivals to offset that behavior. Were this not so, rivals would be enabled to expand their market shares because of the abnormally high prices and would thus deconcentrate the industry. Market rivalry thus automatically weighs the respective influences of efficiency and output restriction and arrives at the firm sizes and industry structures that serve consumers best. There is, therefore, no need for the proposed Concentrated Industries Act, and, in fact, its results would be detrimental.[3]

As any student of antitrust will remember, there was a period in the history of U.S. antitrust enforcement during which cases were brought on the basis of an assumption, now overwhelmingly thought to be invalid, that, somehow, an industry's moderate to high level of concentration and higher than average profitability were bad for the American consumer. In fact, had this nation succeeded in a program of deconcentrating its most important industries in the early 1970's, it would have faced even more severe economic problems in confronting growing and intensive competition from foreign firms and the rapid emergence of intensely competitive world markets and industry structures throughout the 1970's and 80's.

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[3] Separate Statement at 54.

Judge Bork's 1978 book, The Antitrust Paradox, has had an extraordinary influence in the refinement by the Supreme Court of its views in a number of antitrust cases. Since its publication, this outstanding work has been cited approvingly in six majority opinions written by Justices commonly viewed as having widely varying judicial philosophies, Justice Brennan in the Cargill[4] case in 1986, Justice Powell in the Matsushita[5] case in 1986, Justice Stevens in the Aspen Skiing[6] case in 1985 and in the NCAA[7] case in 1984 and Chief Justice Burger in two 1978 cases, Reiter v. Sonotone[8] and United States v. United States Gypsum Co.[9] Justice O'Connor cited Judge Bork's book in her 1984 concurring opinion in Jefferson Parish Hospital District No. 2 v. Hyde,[10] as did Justice Blackman in his 1978 dissent in National Society of Professional Engineers v. United States.[11] Indeed, it should be noted that every member of the present Supreme Court joined one or another of these opinions.

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[4] Cargill, Inc. v. Monfort of Colorado, Inc., 107 S. Ct. 484, 495 n.17 (1986).

[5] Matsushita Elec. Indus. v. Zenith Radio, Co., 106 S. Ct. 1348, 1357 (1986).

[6] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 105 S. Ct. 2847, 2858 and n.29, 31, 2860-61 n. 39 (1985).

[7] NCAA v. Board of Regents, 468 U.S. 85, 101 (1984).

[8] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1978).

[9] United States v. United States Gypsum Co., 438 U.S. 422, 442 (1978).

[10] Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 36 (1984).

[11] National Society of Professional Engineers v. United States, 435 U.S. 679, 700 n.* (1978).

As I have said earlier in a letter to the Editor of The Washington Post, the fact that six of the nine present Justices have cited Judge Bork's book, and that all of them have joined opinions citing it, demonstrates clearly that the claims of Judge Bork's critics that his antitrust views are not in the mainstream or somehow "extreme" are just plain wrong.

Judge Bork's critics are also quite wrong in their suggestion that Judge Bork's antitrust writings are anticonsumer. To the contrary, the central thesis of Judge Bork's book, as summarized in chapter 2, is that:

> (1) The only legitimate goal of American Antitrust law is the maximization of consumer welfare; therefore,
> (2) "Competition", for purposes of antitrust analysis, must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree.[12]

It is true that Judge Bork has also stressed that protection of consumer welfare is sometimes inconsistent with protection of some businesses from legitimate competition. The key point, here, however, is that Judge Bork advocates pro-competitive policies which promote the very efficiency that makes the enhancement of consumer welfare possible.

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[12] R. Bork, The Antitrust Paradox at 51.

Therefore, Judge Bork's critics, and not Judge Bork, are out of touch with the center of legitimate judicial and economic thought about the proper direction of antitrust analysis. As I said in my earlier letter, the mainstream view, which no one has helped promote more than Judge Bork, is that the proper antitrust policy is one which encourages strong private and government action to promote consumer welfare rather than unnecessary government intervention to protect politically favored competitors.

Thank you for giving me the opportunity to present my views.

The CHAIRMAN. Thank you.

Our next witness is Mr. Thomas Kauper, professor of law at the University of Michigan Law School, and a former Assistant Attorney General of the Antitrust Division.

Mr. KAUPER. Thank you, Mr. Chairman. I trust that my statement will be submitted for the record.

The CHAIRMAN. Yes, the entire statement will be inserted in the record.

TESTIMONY OF THOMAS E. KAUPER

Mr. KAUPER. Judge Bork has been a major figure in the antitrust field for three decades. His views, expressed primarily in his scholarly writings during a very creative and productive period in academic life, have been highly influential in the evolution and reformulation of antitrust doctrine. He has been influential precisely because his ideas have been accepted, in whole or in part, by academics, policy makers and judges—including Justices of the Supreme Court—in large numbers.

Many in academic life aspire to have such an impact through what we write. Few ever achieve it. That Judge Bork has done so is grounds for praise, not condemnation.

Judge Bork's antitrust views are very much in the mainstream of current thinking. His central thesis, that the sole goal of the antitrust laws is consumer welfare, is based upon a careful analysis of the legislative history of the Sherman Act. This basic proposition is still challenged by some, who would use the antitrust laws to satisfy additional social and political ends. The debate over goals rages on in academic journals, and within the Congress. But the Supreme Court, in a series of decisions beginning in 1977, has apparently agreed with Judge Bork's starting proposition. So, too, the Court in the past decade has developed substantive antitrust doctrine in accord with an economic analysis focused on price and output effects, as Judge Bork's writings have urged. Unless the Supreme Court of the past decade has itself been outside the mainstream of antitrust thinking, Judge Bork is clearly within it.

This is not to suggest that the Supreme Court has agreed with everything Judge Bork has written. The Court, for example, has shown no willingness to depart from the rule that resale price maintenance is per se illegal despite criticism of the rule by Judge Bork—and, I might add, a number of others—and the fact that the rule appears inconsistent with the rationale of the *Sylvania* case.

In his powerful book, "The Antitrust Paradox," Judge Bork criticizes a number of Supreme Court decisions. But if criticism of Supreme Court opinions is grounds for disqualification from taking a seat on the Court, virtually the entire academic community would be equally disqualified.

It should not be assumed that Judge Bork would vote to overrule Supreme Court decisions which he has criticized in the past. His antitrust analysis is predicated on legislative intent, the need for certainty and predictability in judicially formulated rules, the desirability of standards which can be intelligently and manageably applied in the litigation process, and a recognition that judges are not free to implement their own social and economic policies.

Within such a philosophy, longstanding judicially formulated rules upon which substantial reliance has been placed are not to be overruled lightly. The suggestion of some that Judge Bork would feel free to ignore a federal statute with which he disagreed is even more extreme and totally inconsistent with the philosophy he has repeatedly expressed.

Some of Judge Bork's critics have suggested that his views reflect nothing more than a bias in favor of big business. Most charitably, this reflects a misunderstanding of what he has said. The antitrust policies he has formulated are neither pro-business nor anti-business, but are a coherent set of principles designed to promote consumer welfare. Their application is not governed by the defendant's size. His views could not have commanded the widespread respect of scholars and judges if they were based on nothing more than personal bias.

During his tenure as Solicitor General, Judge Bork was responsible for handling the Government's antitrust cases in the Supreme Court. It was during that same period that I served as Assistant Attorney General in charge of the Antitrust Division. I can personally attest to the full support which he gave to the Antitrust Division during his tenure. Perhaps he simply agreed with the positions we were taking. If he did not, he did not use his position to reshape the Government's enforcement policy. During his brief tenure as Acting Attorney General, Judge Bork was required under then-existing Department policies to approve all Antitrust Division cases as a prerequisite to filing. He did so without reservation and with a dispatch uncharacteristic of Attorneys General under whom I worked. He served the Department and the nation in accord with the highest standards of professionalism.

As a judge of the Court of Appeals for the District of Columbia Circuit, Judge Bork has written few antitrust opinions. Only one, the *Rothery* case, has been criticized for its holding that actions taken by a joint venture with 6 percent of the market could not be anticompetitive. But the idea that firms which lack market power cannot have an adverse competitive impact is hardly a novel idea. Other courts have said the same, and the idea is simply too sensible to be characterized as a radical departure from the mainstream.

In conclusion, Judge Bork has a long and distinguished record as an academic, public official, and judge. In terms of experience, intellect and integrity, few persons nominated to the Court during my professional lifetime have been as qualified.

I am not a constitutional scholar, but I do know Judge Bork. I do not know the Judge Bork portrayed in some press accounts. He knows that constitutional protections are not determined by majority vote. He believes in the individual and what the individual, unfettered by Government restraint, can accomplish. He values the power of free speech, and he is a warm and compassionate human being.

I am proud to support his nomination to serve as Associate Justice of the Supreme Court of the United States. Thank you, Mr. Chairman.

[The prepared statement of Thomas E. Kauper follows:]

STATEMENT

of

Professor Thomas E. Kauper
Henry M. Butzel Professor of Law
University of Michigan Law School

My name is Thomas E. Kauper. I am currently Henry M. Butzel Professor of Law at the University of Michigan Law School. I have been teaching and writing in the antitrust field since 1964. From July, 1972 through July, 1976, I served as Assistant Attorney General in charge of the Antitrust Division, United States Department of Justice. During a substantial part of that period, Judge Robert Bork served as Solicitor General of the United States. While I had known Judge Bork previously through his writings, I came to know him well personally while we were colleagues at the Department. We went through a good deal together.

Judge Bork has been a major figure in the antitrust field for three decades. His views, expressed primarily in his scholarly writings during a very creative and productive period in academic life, have been highly influential in the evolution and reformulation of antitrust doctrine.[1] He has been influential precisely because his ideas have been accepted, in whole or in part, by academics, policy makers and judges (including Justices of the Supreme Court) in large numbers. Many in academic life aspire to have such an impact simply through what we write. Few ever achieve it. That Judge Bork has done so is grounds for praise, not condemnation. He has put forth a simple but powerful set of ideas, ideas which have influenced the law of their own force.

Judge Bork's antitrust views are very much in the mainstream of current thinking. His central thesis, that the sole goal of the antitrust laws is consumer welfare, is based upon a careful analysis of the legislative history of the Sherman Act. This basic proposition is still challenged by some, who would use the antitrust laws to satisfy additional social and political ends. The debate over goals rages on in academic journals,[2] and within the Congress. But in a series of decisions beginning with Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), the Supreme Court has apparently agreed with Judge Bork's starting proposition.[3] So too the Court in the past decade has developed substantive antitrust doctrine in accord with an economic analysis focused on price and output effects, as Judge Bork's writings have urged. The Sylvania case and the Court's decision in Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) are but two examples. Unless the Supreme Court of the past decade has itself been outside the mainstream of antitrust thinking, Judge Bork is clearly within it.

This is not to suggest that the Supreme Court has agreed with everything Judge Bork has written. The Court, for example, has shown no willingness to depart from the rule first adopted in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) that resale price maintenance is per se illegal, despite criticism of the rule by Judge Bork (and a number of others) and the fact that the rule appears inconsistent with the rationale of the Sylvania case. In his powerful book, The Antitrust Paradox, Judge Bork criticizes a number of Supreme Court decisions. But if criticism of Supreme Court opinions is grounds for disqualification from taking a seat on the Court, virtually the entire academic community would be equally disqualified. Such criticism is part of our job.

It should not be assumed that Judge Bork would vote to overrule Supreme Court decisions which he has criticized in the past. His antitrust analysis, set forth in detail in The Antitrust Paradox, is predicated on legislative intent, the need for certainty and predictability in judicially formulated rules, the desirability of standards which can be intelligently and manageably applied in the litigation process, and a recognition that judges in a democratic society are not free to implement their own political and social policies. Within such a philosophy, long-standing judicially formulated rules upon which substantial reliance has been placed are not to be overruled lightly. The suggestion of some that Judge Bork would feel free to ignore a federal statute with which he disagreed is even more extreme, and totally inconsistent with the philosophy he has repeatedly expressed.

Some of Judge Bork's critics have suggested that his views reflect nothing more than a bias in favor of "big business." Most charitably, this reflects a misunderstanding of what he has said. The antitrust policies he has formulated are neither pro-business nor anti-business, but are a coherent set of principles designed to promote consumer welfare. Their application is not governed by the defendant's size. His views could not have commanded the widespread respect of scholars and judges if they were based on nothing more than personal bias.

During his tenure as Solicitor General, Judge Bork was responsible for handling the government's antitrust cases in the Supreme Court. I can personally attest to the full support which he gave to the Antitrust Division during his tenure. Perhaps he simply agreed with the positions we were taking. If he did not, he did not use his position to reshape government enforcement policy in accord with his own views. During his brief tenure as Acting Attorney General, Judge Bork was required under then-existing Department policies to approve all Antitrust Division cases as a prerequisite to filing. He did so, without reservation and with a dispatch uncharacteristic of Attorneys General under whom I worked. He served the Department, and the nation, in accord with the highest standards of professionalism.

As a judge of the Court of Appeals for the District of Columbia Circuit, Judge Bork has written few antitrust opinions. His opinion in FTC v. PPG Industries, Inc., 798 F.2d 1500 (D.C. Cir. 1986), a merger case, is carefully crafted and fully consistent with standards applied by the Supreme Court under Section 7 of the Clayton Act. To my knowledge, no one has suggested otherwise. The most significant of his antitrust opinions is Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792

F.2d 210 (D.C. Cir. 1986). In Rothery, Judge Bork concluded that actions taken by a moving van line, a joint venture, could not be anti-competitive because with a market share of but six (6) percent defendants lacked the market power to have any impact on price or output. Some have suggested that in using such a market power test, Judge Bork was applying a standard inconsistent with contemporary antitrust standards in pursuit of his own views. This is simply not so. The idea that firms which lack market power (as measured by market share) cannot have an adverse competitive impact is hardly a novel idea. Other courts have said the same.[4] This approach is too sensible to be characterized as a radical departure from the mainstream.

Judge Bork has a long and distinguished record as an academic, public official and judge. In terms of experience, intellect and integrity, few persons nominated to the Court during my professional lifetime have been as qualified. At the core of his antitrust views is a philosophy of judicial restraint which rests on the fundamental proposition that in a democratic society legislatures, not judges, should make social and political judgments. This is not a philosophy which advocates that judges implement their own political views. I am not a constitutional scholar. But I know Judge Bork. I do not know the Judge Bork portrayed in some press accounts. He knows that constitutional protections are not determined by majority vote. He believes in the individual, and what the individual, unfettered by government restraint, can accomplish. He values the power of free speech. And he is a warm and compassionate human being. I am proud to support his nomination to serve as Associate Justice of the Supreme Court of the United States.

NOTES

1. *See* particularly Bork, THE ANTITRUST PARADOX (1978); Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, 22 U. Chi. L. Rev. 157 (1954); Bork and Bowman, *The Crisis in Antitrust*, 65 Colum. L. Rev. 363 (1965); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, Part II*, 74 Yale L.J. 775 (1965) and *Part II*, 75 Yale L.J. 373 (1966); Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. Law & Econ. 7 (1966); Bork, *A Reply to Professors Gould and Yamey*, 76 Yale L.J. 731 (1967); Bork, *Resale Price Maintenance and Consumer Welfare*, 77 Yale L.J. 950 (1968).

2. For a very recent exchange, *compare* Easterbrook, *Workable Antitrust Policy*, 84 Mich. L. Rev. 1696 (1986) with Fox, *Consumer Beware Chicago*, 84 Mich. L. Rev. 1714 (1986) and Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 Cornell L. Rev. 1140 (1981).

3. *See*, *e.g.*, *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979); *National Collegiate Athletic Ass'n* v. *Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984); *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986); *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 107 S. Ct. 484 (1986).

4. *See*, *e.g.*, *R. C. Dick Geothermal Corp.* v. *Thermogenics, Inc.*, 1987-1 CCH Trade Cas. 67, 483 (9th Cir.) and cases there cited.

The CHAIRMAN. I am sure he is proud to have to have men of your caliber supporting his nomination. It is a great tribute to him.

I only have one question, and I will preface my question with a brief remark; that is, it is true, I would say to Mr. Halverson, that I have read—and I believe what prompted your letter to the editor, to the press, stating that Judge Bork was out of the mainstream in antitrust.

We have heard here in the hearings that his attitude towards various forms of retail price maintenance and other issues are anticonsumer.

But I must tell you my concern because I am one of those folks who, although viewed on civil liberties and civil rights as a "liberal," has been skeptical about the utility of our antitrust laws in a changing world. But what my concern is—and I raise this with all of you, and any one of you or all of you who wish to speak to it—is that there seems to me to be a dichotomy between how Judge Bork views the role of judging when it comes to antitrust questions as distinct from with his view of judging as it comes to all other questions.

He talks about being a majoritarian, a Madisonian, as he defines Madisonian terms. He argues very strenuously and in a very articulate and powerful way that legislatures should make the decisions, not nine men and women sitting in a court across the street—and I won't go into his basic philosophy on the law, which I suspect you all understand well. I think after reading all he has written and listening to him intensely for over 30 hours, I think I have a sense of what his basic philosophy is.

There seems to be an inconsistency, and it is one I would like to raise with you.

Mr. AREEDA. May I respond to that?

The CHAIRMAN. Let me finish the question, if I can.

He has described the Supreme Court's obligation, to respond to the will of the Congress in the area of antitrust as an "institutional handicap." He said very clearly that the courts, when confronted with laws which are "unrelated to reality," and which are utterly arbitrary, should simply refuse to enforce those laws as written.

Now, that's related to antitrust. As it relates to privacy and other questions, he says, no matter how arbitrary, no matter how unrelated to reality they are, if the majority passes them, unless they are explicitly prevented from doing so in the Constitution, the judge should adhere to it.

You understand my problem. Would you respond, Professor, to the apparent dilemma I have?

Mr. AREEDA. Yes. The first and perhaps most important distinction is that when dealing with a statute, the legislature that enacted it can always change it. If the Court is wrong about a constitutional matter, by contrast, it speaks the last word, leaving no room for the legislature to correct it.

Second, the antitrust laws are very peculiar statutes, for say almost nothing. Virtually all of antitrust law is a judicial creation based on a few very vague and general words in the Sherman Act of 1890 and the legislation of 1914. So Congress has not spoken—and I think most observers agree—with any clarity about how to give meaning to the general words of the antitrust statutes.

So the courts have no choice but to create such internal coherence, consistency, and wisdom as they can muster. Antitrust law is more like a common law subject than a statutory subject, because it is virtually all judge-created.

The particular sentence you quoted from "The Antitrust Paradox" is a hyperbole that fits the particular illustration that Judge Bork used. The illustration was of an imaginary legislature that made a defendant guilty—or innocent—if the court finds that spirits have brought about the challenged activity. Bork commented that no judge could intelligently implement such a statute.

He was suggesting that some parts of the antitrust laws might involve a contradiction. On the one hand the statute specifies that the courts are to protect competition. At the same time, one can find some statements by some legislators in the course of the legislative history that they meant to protect inefficient producers from marketplace competition. The essence of what Professor Bork said—and I say Professor Bork because these writings are from his academic days—was that one should look at the general concept stated in the statute and make what sense out of it one can until Congress legislates more specifically.

Mr. KAUPER. Senator, may I address that just briefly?

The CHAIRMAN. Sure. Please do.

Mr. KAUPER. The dichotomy which you suggest is based on some notion that in enforcing the antitrust laws, as Judge Bork perceives them, he is not really giving credit to legislative intention or——

The CHAIRMAN. Well, let me be very specific. He says specifically, that if the Congress passes a law that is unrelated to reality——

Mr. KAUPER. Correct.

The CHAIRMAN. If Congress passes a law, they mean to pass a law.

Mr. KAUPER. Senator, I understand that. The poltergeist example is the one which he uses in the book, and to which Professor Areeda has already alluded.

But let us make clear we understand a distinction between what the legislative intention is on the one hand and a judicial philosophy. Put another way, we might disagree with Judge Bork's reading of legislative history, but that does not mean that, as a process, that's not what he's doing. He thinks at least that is what he's doing.

As to the example of the situation of the law which seems to make no sense, it is in the setting of a statute—and I think this reference was primarily with respect to the Clayton Act and the Robinson-Patman Act—the last words of which say the conduct is unlawful where it tends to lessen competition. The question then is what does a judge do if the judge examines that particular conduct and finds, based on the general perception of what competition is, that conduct in this category does not lessen competition?

Now, I don't think one can suggest that that conclusion by a judge is inconsistent with the legislative intention at all. The judge has simply not been able to find that the conduct in question has that effect. If the Congress has determined otherwise, then presumably the statute will have to be enforced.

But given the language of the antitrust laws, I don't believe you can come to that conclusion.

The CHAIRMAN. I want to thank you very much.

Senator Thurmond.

Senator THURMOND. Thank you very much. I just have two questions for each of you.

Is Judge Bork, in your opinion, competent in antitrust matters, and if he is confirmed to the Supreme Court, will he be fair and reasonable and look after the interests of the consumers? That's one question. I would like to get your answer on that.

We'll start right here and go right down the line. Call out your name and tell me the answer, yes or no.

Mr. KAUPER. Thomas Kauper. I don't have any doubt, that the answer to the question is yes, he would be fair and reasonable, and he would keep the Court approximately where it is right now.

Mr. BAKER. Donald Baker. I entirely agree. He is a fair, reasonable and thoughtful person, very dedicated to consumer welfare.

Mr. AREEDA. Phillip Areeda. Yes——

Senator THURMOND. And would look after consumers?

Mr. BAKER. Absolutely.

Mr. AREEDA. YES.

Mr. HALVERSON. James T. Halverson. The answer is a very definite yes.

Senator THURMOND. The next question is, taking him all around now, not just antitrust, does he possess the qualities that is expected of a Supreme Court Justice? The American Bar Association considers mainly three points: integrity, judicial temperament, and professional competence. I would add to that courage and dedication, too, and common sense.

In your opinion, does he possess those qualities and would he make an able, a fair, and a reasonable Supreme Court Justice? Does he possess those qualities and would you approve of him to be on the Supreme Court?

Mr. KAUPER. Senator, I think, based on the American Bar standards, my standards, or the standards which I think this committee should apply, the answer is yes.

Senator THURMOND. Speak a little louder.

Mr. KAUPER. I'll try it again. Based on the ABA standards, which you have suggested, and my own sense of standards, or the standards which I believe this committee should apply, and that the Senate of the United States should apply, I think he is highly qualified and should be confirmed.

Senator THURMOND. Mr. Baker.

Mr. BAKER. I wouldn't be here unless the answer to your question is yes, and strongly yes. He is an exceptional man and would be an exceptional Justice.

Mr. AREEDA. I agree.

Senator THURMOND. Mr. Halverson.

Mr. HALVERSON. He is one of the most extraordinary minds and one of the finest gentlemen I have ever met. He would make an excellent Supreme Court Justice.

Senator THURMOND. Thank you very much. That's all the questions I have, Mr. Chairman.

The CHAIRMAN. Thank you very much, gentlemen, for spending so much time with us today and coming on so late. Your testimony is much appreciated. You all are excused. Thank you.

With regard to tomorrow's schedule, we will start tomorrow morning and hopefully finish all public witnesses tomorrow. I don't think it's likely we are able to get finished in time to have our vote in committee on Thursday, but I would like you and I to talk about that. I would like to suggest the possibility of Tuesday afternoon. But if you and I can discuss that a little bit when we adjourn, we will announce tomorrow when we will have the executive committee meeting for a vote on the nomination in committee.

I thank everyone for their patience. The schedule for tomorrow is, I believe, begins with an antitrust panel, made up of the dean of Georgetown Law Center, the attorney general of New York, and the attorney general of West Virginia, and then moves on with Beverly LaHaye, president of Concerned Women for America, and ends the day. Then we have Vilma Martinez, a Los Angeles attorney, and then two panels, then Roy Innis, Congress for Racial Equality, and three more panels. With the grace of God and the good will of the neighbors, we will have the public session concluded.

I thank you all for your indulgence. We are recessed until tomorrow at 10 a.m.

[Whereupon, at 7 p.m., the committee adjourned to reconvene at 10 a.m., Wednesday, September 30, 1987.]

NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

WEDNESDAY, SEPTEMBER 30, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:04 a.m., in room SR-325, Russell Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Thurmond, Hatch, Simpson, Grassley, Specter, and Humphrey.

The CHAIRMAN. Good morning, everyone. I welcome our first panel and all those who are waiting. I have a few brief remarks to make before we hear from our witnesses.

First of all, I would like the press to note that I apparently have breathed new life into Mr. Kinnock's campaign. He is more in the news now than he ever has been, and I have sent him all my speeches. [Laughter.]

Secondly, I would like to point out that I have been sent—and I want to make sure I get this straight—the committee is in receipt of letters signed by 1,925 law professors opposing Judge Bork's confirmation. The reason I mention that now rather than just quietly put them in the record, as I was going to, is yesterday the assertion was made that maybe this was somehow by one of the law deans all manufactured out of whole cloth. They are the letters, almost 2,000. Almost 40 percent of the active, practicing law professors in America have sent letters signed individually—and I will put them in the record—objecting to Judge Bork becoming Justice Bork.

The 1,925 figures represents, I am told, 40 percent of the full-time law faculty of the American Bar Association-accredited law schools in 47 States and the District of Columbia. I might add that there are no ABA-accredited law schools in Rhode Island, Alaska and Nevada. The 1,925 figure also represents a faculty from 90 percent of the ABA-accredited law schools, 153 schools out of a total of 172 schools.

To give you a basis of comparison, only 300 law professors signed letters opposing the nomination of G. Harold Carswell. These letters bring to more than 2,000 the number of law professors and deans who have announced their opposition to the Bork nomination. I would like to enter into the record the list of the 1,925 signatures and of the 153 law schools. Following Senator Thurmond's admonition about the taxpayers' money, I will not ask that every letter be reprinted in the record, but they will be available for anyone to look at if they wish.

[The information follows:]

LAW SCHOOLS AT WHICH LAW PROFESSORS SIGNED LETTERS IN OPPOSITION TO ROBERT BORK'S NOMINATION TO THE SUPREME COURT[*]

University of Akron, C. Blake McDowell Law Center, Ohio
The University of Alabama School of Law, Alabama
Albany Law School, Union University, New York
American University, Washington College of Law, Washington, D.C.
Antioch School of Law, Washington, D.C.
University of Arizona College of Law, Arizona
Arizona State University College of Law, Arizona
University of Arkansas, Fayetteville, School of Law, Arkansas
University of Arkansas at Little Rock School of Law, Arkansas
University of Baltimore School of Law, Maryland
Boston College Law School, Massachusetts
Boston University School of Law, Massachusetts
University of Bridgeport School of Law, Connecticut
Brigham Young University, J. Reuben Clark Law School, Utah
Brooklyn Law School, New York
University of California at Berkeley School of Law (Boalt Hall), California
University of California at Davis School of Law, California
University of California, Hastings College of Law, California
University of California at Los Angeles (UCLA) School of Law, California
California Western School of Law, California
Capital University Law School, Ohio
Case Western Reserve University Law School, Ohio
University of Chicago Law School, Illinois
University of Cincinnati College of Law, Ohio
City University of New York Law School at Queens College, New York
Cleveland State University, Cleveland-Marshall College of Law, Ohio
University of Colorado School of Law, Colorado
Columbia University School of Law, New York
University of Connecticut School of Law, Connecticut
Thomas M. Cooley Law School, Michigan
Cornell Law School, New York
Cumberland School of Law of Samford University, Alabama
University of Dayton School of Law, Ohio
The Delaware Law School, Widener University, Delaware
University of Denver College of Law, Colorado
De Paul University College of Law, Illinois

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[*] Law professors at these schools signed letters in opposition to Robert Bork's nomination to the Supreme Court. This list is for identification purposes only and is not intended to imply a position on the Bork nomination by any school. The language of some of the letters varies at a few schools.

University of Detroit School of Law, Michigan
Detroit College of Law, Michigan
Drake University Law School, Iowa
Duke University School of Law, North Carolina
Emory University School of Law, Georgia
University of Florida, College of Law, Florida
Florida State University College of Law, Florida
Franklin Pierce Law Center, New Hampshire
Georgetown University Law Center, Washington, D.C.
George Washington University National Law Center, Washington, D.C.
University of Georgia School of Law, Georgia
Georgia State University College of Law, Georgia
Golden Gate University School of Law, California
Gonzaga University School of Law, Washington
Hamline University School of Law, Minnesota
Harvard University Law School, Massachusetts
University of Hawaii William S. Richardson School of Law, Hawaii
University of Houston Law Center, Texas
Howard University School of Law, Washington, D.C.
University of Idaho College of Law, Idaho
University of Illinois College of Law, Illinois
Illinois Institute of Technology, Chicago-Kent College of Law, Illinois
Indiana University at Bloomington School of Law, Indiana
Indiana University School of Law, Indianapolis, Indiana
University of Iowa College of Law, Iowa
University of Kansas School of Law, Kansas
University of Kentucky College of Law, Kentucky
Lewis and Clark College, Northwestern School of Law, Oregon
Louisiana State University Law Center, Louisiana
University of Louisville School of Law, Kentucky
Loyola University School of Law, Chicago, Illinois
Loyola Law School, California
Loyola University School of Law, New Orleans, Louisiana
McGeorge School of Law, University of the Pacific, California
University of Maine School of Law, Maine
Marquette University Law School, Wisconsin
John Marshall Law School, Illinois
University of Maryland School of Law, Maryland
Memphis State University Cecil C. Humphreys School of Law, Tennessee
Mercer University Law School, Georgia
University of Miami School of Law, Florida
University of Michigan Law School, Michigan
University of Minnesota Law School, Minnesota
Mississippi College of Law, Mississippi
University of Mississipppi School of Law, Mississippi
University of Misssouri-Columbia, School of Law, Missouri
University of Missouri-Kansas City, School of Law, Missouri
William Mitchell College of Law, Minnesota
University of Montana School of Law, Montana
University of Nebraska College of Law, Nebraska

University of New Mexico School of Law, New Mexico
State University of New York at Buffalo School of Law, New York
New York Law School, New York
New York University School of Law, New York
University of North Carolina School of Law, North Carolina
North Carolina Central University School of Law, North Carolina
University of North Dakota School of Law, North Dakota
Northeastern University School of Law, Massachusetts
Northern Illinois University College of Law, Illinois
Northern Kentucky University, Salmon P. Chase College of Law, Kentucky
Northwestern University School of Law, Illinois
Notre Dame Law School, Indiana
Ohio State University College of Law, Ohio
Nova University Center for the Study of Law, Florida
Oklahoma City University School of Law, Oklahoma
University of Oregon School of Law, Oregon
Pace University School of Law, New York
University of Pennsylvania Law School, Pennsylvania
University of Pittsburgh School of Law, Pennslyvania
University of Puget Sound School of Law, Washington
University of Richmond, The T.C. Williams School of Law, Virginia
Rutgers, The State University of New Jersey School of Law, Camden, New Jersey
Rutgers, The State University of New Jersey, S.I. Newhouse Center for Law and Justice, New Jersey
Saint Louis University School of Law, Missouri
St. Mary's University of San Antonio School of Law, Texas
University of San Diego School of Law, California
University of San Francisco School of Law, Calfornia
Santa Clara University School of Law, California
Seton Hall University School of Law, New Jersey
University of South Carolina School of Law, South Carolina
University of South Dakota School of Law, South Dakota
South Texas College of Law, Texas
University of Southern California Law Center, California
Southern Illinois University School of Law, Illinois
Southern Methodist University School of Law, Texas
Southern University Law Center, Louisiana
Southwestern University School of Law, California
Stanford Law School, California
Suffolk University Law School, Massachusetts
Syracuse University College of Law, New York
Temple University School of Law, Pennsylvania
University of Tennessee College of Law, Tennessee
The University of Texas School of Law, Texas
Texas Southern University, Thurgood Marshall School of Law, Texas
Texas Tech University School of Law, Texas
Touro College Jacob D. Fuchsberg Law Center, New York
Tulane University School of Law, Louisiana
The University of Tulsa College of Law, Oklahoma
University of Utah College of Law, Utah

Valparaiso University School of Law, Indiana
Vanderbilt University School of Law, Tennessee
Vermont Law School, Vermont
Villanova University School of Law, Pennslyvania
University of Virginia School of Law, Virginia
Washburn University School of Law, Kansas
Washington and Lee University School of Law, Virginia
University of Washington School of Law, Washington
Wayne State University Law School, Michigan
West Virginia University College of Law, West Virginia
Western New England College School of Law, Massachusetts
Whittier College School of Law, California
Willamette University College of Law, Oregon
College of William and Mary, Marshall-Wythe School of Law, Virginia
University of Wisconsin Law School, Wisconsin
University of Wyoming College of Law, Wyoming
Yale Law School, Connecticut
Yeshiva University, Benjamin N. Cardozo School of Law, New York

LAW PROFESSORS WHO SIGNED LETTERS IN OPPOSITION TO ROBERT BORK'S NOMINATION TO THE SUPREME COURT*

Dean Carro, University of Akron, C. Blake McDowell Law Center, Ohio
William Jordan, University of Akron, C. Blake McDowell Law Center, Ohio
Marla Mitchell, University of Akron, C. Blake McDowell Law Center, Ohio

William Andreen, University of Alabama School of Law, Alabama
Tony Freyer, University of Alabama School of Law, Alabama
Wythe Holt, University of Alabama School of Law, Alabama
Norman Singer, University of Alabama School of Law, Alabama
Norman Stein, University of Alabama School of Law, Alabama
George Taylor, University of Alabama School of Law, Alabama
Manning Warren, University of Alabama School of Law, Alabama

Ira Bloom, Albany Law School, Union University, New York
Stephen Gottlieb, Albany Law School, Union University, New York
Bernard Harvith, Albany Law School, Union University, New York
Katheryn Katz, Albany Law School, Union University, New York
Susan McLarlane, Albany Law School, Union University, New York
Lawrence Mitchell, Albany Law School, Union University, New York
Mary Moses, Albany Law School, Union University, New York
Jonn Voyd, Albany Law School, Union University, New York
Kathleen Waits, Albany Law School, Union University, New York

Susan Bennett, American University, Washington College of Law, Washington, D.C.
James Boyle, American University, Washington College of Law, Washington, D.C.
Barlow Burke, American University, Washington College of Law, Washington, D.C.
Nancy Cook, American University, Washington College of Law, Washington, D.C.

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* The inclusion of law school names is for identification purposes only and is not intended to imply a position on the Bork nomination by any school. Visiting professors are identified by the school at which they signed a letter. The language of some of the letters varies at a few schools.

Robert Dinerstein, American University, Washington College of Law, Washington, D.C.
Greer Goldman, American University, Washington College of Law, Washington, D.C.
Robert Goldman, American University, Washington College of Law, Washington, D.C.
Mark Hager, American University, Washington College of Law, Washington, D.C.
Peter Jaszi, American University, Washington College of Law, Washington, D.C.
Patrick Kehoe, American University, Washington College of Law, Washington, D.C.
Robert Lubic, American University, Washington College of Law, Washington, D.C.
Elliott Milstein, American University, Washington College of Law, Washington, D.C.
Joel Paul, American University, Washington College of Law, Washington, D.C.
Andrew Pike, American University, Washington College of Law, Washington, D.C.
Andrew Popper, American University, Washington College of Law, Washington, D.C.
Nancy Polikoff, American University, Washington College of Law, Washington, D.C.
Paul Rice, American University, Washington College of Law, Washington, D.C.
Ira Robbins, American University, Washington College of Law, Washington, D.C.
Mark Sargent, American University, Washington College of Law, Washington, D.C.
Mark Sargentich, American University, Washington College of Law, Washington, D.C.
Herman Schwartz, American University, Washington College of Law, Washington, D.C.
Ann Shalleck, American University, Washington College of Law, Washington, D.C.
O'Neal Smalls, American University, Washington College of Law, Washington, D.C.
Janet Spragens, American University, Washington College of Law, Washington, D.C.
Robert Vaughn, American University, Washington College of Law, Washington, D.C.
Burton Wechsler, American University, Washington College of Law, Washington, D.C.
Joan Williams, American University, Washington College of Law, Washington, D.C.

Edward Allen, Antioch School of Law, Washington, D.C.
Shelley Broderick, Antioch School of Law, Washington, D.C.
Russell Cort, Antioch School of Law, Washington, D.C.
Michael Diamond, Antioch School of Law, Washington, D.C.

Marinda Harpole, Antioch School of Law, Washington, D.C.
George Lacy, Antioch School of Law, Washington, D.C.

Arthur Andrews, University of Arizona College of Law, Arizona
Barbara Atwood, University of Arizona College of Law, Arizona
William Boyd, University of Arizona College of Law, Arizona
Ronald Cherry, University of Arizona College of Law, Arizona
Leslie Espinoza, University of Arizona College of Law, Arizona
Robert Glennon, University of Arizona College of Law, Arizona
Kenney Hegland, University of Arizona College of Law, Arizona
Reka Hoff, University of Arizona College of Law, Arizona
Junius Hoffman, University of Arizona College of Law, Arizona
Suzanne Rabe, University of Arizona College of Law, Arizona
James Ratner, University of Arizona College of Law, Arizona
Theodore Schneyer, University of Arizona College of Law, Arizona
Thomas Schuessler, University of Arizona College of Law, Arizona
Andrew Silverman, University of Arizona College of Law, Arizona
Jane Silverman, University of Arizona College of Law, Arizona
Roy Spece, University of Arizona College of Law, Arizona
David Wexler, University of Arizona College of Law, Arizona
Robert Williams, University of Arizona College of Law, Arizona

Jane Aiken, Arizona State University College of Law, Arizona
Douglas Blaze, Arizona State University College of Law, Arizona
Richard Brown, Arizona State University College of Law, Arizona
Richard Dahl, Arizona State University College of Law, Arizona
Mark Hall, Arizona State University College of Law, Arizona
David Kader, Arizona State University College of Law, Arizona
John Leshy, Arizona State University College of Law, Arizona
Gary Lowenthal, Arizona State University College of Law, Arizona
Leigh Price, Arizona State University College of Law, Arizona
Ralph Spritzer, Arizona State University College of Law, Arizona
Robert Suggs, Arizona State University College of Law, Arizona
Fernando Teson, Arizona State University College of Law, Arizona
Bonnie Tucker, Arizona State University College of Law, Arizona
Lawrence Weeks, Arizona State University College of Law, Arizona

Richard Atkinson, University of Arkansas, Fayetteville, School of Law, Arkansas
Carlton Bailey, University of Arkansas, Fayetteville, School of Law, Arkansas
Lonnie Beard, University of Arkansas, Fayetteville, School of Law, Arkansas
Chauncey Brummer, University of Arkansas, Fayetteville, School of Law, Arkansas
Charles Carnes, University of Arkansas, Fayetteville, School of Law, Arkansas
Morton Gitelman, University of Arkansas, Fayetteville, School of Law, Arkansas

Rafael Guzman, University of Arkansas, Fayetteville, School of Law, Arkansas
Terry Kirkpatrick, University of Arkansas, Fayetteville, School of Law, Arkansas
William Lancaster, University of Arkansas, Fayetteville, School of Law, Arkansas
Robert Leflar, University of Arkansas, Fayetteville, School of Law, Arkansas
Mary Matthews, University of Arkansas, Fayetteville, School of Law, Arkansas
John Watkins, University of Arkansas, Fayetteville, School of Law, Arkansas

John DiPippa, University of Arkansas at Little Rock School of Law, Arkansas
Lynn Foster, University of Arkansas at Little Rock School of Law, Arkansas
Dent Gitchel, University of Arkansas at Little Rock School of Law, Arkansas
Kenneth Gould, University of Arkansas at Little Rock School of Law, Arkansas
Andrew McClurg, University of Arkansas at Little Rock School of Law, Arkansas
Morell Mullins, University of Arkansas at Little Rock School of Law, Arkansas
John Pagán, University of Arkansas at Little Rock School of Law, Arkansas
Glenn Pasvogel, University of Arkansas at Little Rock School of Law, Arkansas
Griffin Stockley, University of Arkansas at Little Rock School of Law, Arkansas

Herbert Bernhardt, University of Baltimore School of Law, Baltimore, Maryland
Richard Bourne, University of Baltimore School of Law, Baltimore, Maryland
Michele Gilligan, University of Baltimore School of Law, Baltimore, Maryland
Emily Greenberg, University of Baltimore School of Law, Baltimore, Maryland
Steven Grossman, University of Baltimore School of Law, Baltimore, Maryland
Robert Lande, University of Baltimore School of Law, Baltimore, Maryland
Kenneth Lasson, University of Baltimore School of Law, Baltimore, Maryland
Rebecca Levi, University of Baltimore School of Law, Baltimore, Maryland
Arnold Rochvarg, University of Baltimore School of Law, Baltimore, Maryland

Elizabeth Samuels, University of Baltimore School of Law, Baltimore, Maryland
Charles Shafer, University of Baltimore School of Law, Baltimore, Maryland
Stephen Shapiro, University of Baltimore School of Law, Baltimore, Maryland
William Weston, University of Baltimore School of Law, Baltimore, Maryland

Alexis Anderson, Boston College Law School, Massachusetts
Robert Berry, Boston College Law School, Massachusetts
Mark Brodin, Boston College Law School, Massachusetts
Peter Donovan, Boston College Law School, Massachusetts
Sanford Fox, Boston College Law School, Massachusetts
Jane Gionfriddo, Boston College Law School, Massachusetts
Phyllis Goldfarb, Boston College Law School, Massachusetts
Ruth-Arlene Howe, Boston College Law School, Massachusetts
Cynthia Lichtenstein, Boston College Law School, Massachusetts
Reed Loder, Boston College Law School, Massachusetts
Brian Lutch, Boston College Law School, Massachusetts
Judith McMorrow, Boston College Law School, Massachusetts
Zygmunt Plater, Boston College Law School, Massachusetts
Robert Smith, Boston College Law School, Massachusetts
Mark Spiegel, Boston College Law School, Massachusetts
Frank Upham, Boston College Law School, Massachusetts

Kathryn Abrams, Boston University School of Law, Massachusetts
Jack Beerman, Boston University School of Law, Massachusetts
Jane Cohen, Boston University School of Law, Massachusetts
Eric Green, Boston University School of Law, Massachusetts
Wendy Kaplan, Boston University School of Law, Massachusetts
Lois Knight, Boston University School of Law, Massachusetts
Stanley Koppelman, Boston University School of Law, Massachusetts
Ira Lupu, Boston University School of Law, Massachusetts
Frances Miller, Boston University School of Law, Massachusetts
Eva Nilsen, Boston University School of Law, Massachusetts
Tracey Maclin, Boston University School of Law, Massachusetts
Robert Seidman, Boston University School of Law, Massachusetts
David Seipp, Boston University School of Law, Massachusetts
Joseph Singer, Boston University School of Law, Massachusetts
Aviam Soifer, Boston University School of Law, Massachusetts
Larry Yackle, Boston University School of Law, Massachusetts

Gary Bahr, University of Bridgeport School of Law, Connecticut
Terence Benbow, University of Bridgeport School of Law, Connecticut
William Dunlap, University of Bridgeport School of Law, Connecticut

Robert Farrell, University of Bridgeport School of Law, Connecticut
Mary Ferrari, University of Bridgeport School of Law, Connecticut
Neal Fiegenson, University of Bridgeport School of Law, Connecticut
Stuart Filler, University of Bridgeport School of Law, Connecticut
Marilyn Ford, University of Bridgeport School of Law, Connecticut
William Garfinkel, University of Bridgeport School of Law, Connecticut
Charles Heckman, University of Bridgeport School of Law, Connecticut
David King, University of Bridgeport School of Law, Connecticut
Richard Litvin, University of Bridgeport School of Law, Connecticut
Alexander Meiklejohn, University of Bridgeport School of Law, Connecticut
Karen Peterson, University of Bridgeport School of Law, Connecticut
Toni Robinson, University of Bridgeport School of Law, Connecticut
John Sahl, University of Bridgeport School of Law, Connecticut
Albert Schmidt, University of Bridgeport School of Law, Connecticut
James Trowbridge, University of Bridgeport School of Law, Connecticut

Jean Burns, Brigham Young University, J. Reuben Clark Law School, Utah
Michael Goldsmith, Brigham Young University, J. Reuben Clark Law School, Utah
Constance Lundberg, Brigham Young University, J. Reuben Clark Law School, Utah

Nancy Fink, Brooklyn Law School, New York
Phillip Genty, Brooklyn Law School, New York
Susan Herman, Brooklyn Law School, New York
Minna Kotkin, Brooklyn Law School, New York
Bailey Kuklin, Brooklyn Law School, New York
Michael Madow, Brooklyn Law School, New York
Gary Minda, Brooklyn Law School, New York
Elizabeth Schneider, Brooklyn Law School, New York
Jeffrey Stempel, Brooklyn Law School, New York

Stephen Barnett, University of California at Berkeley School of Law (Boalt Hall), California
Babette Barton, University of California at Berkeley School of Law (Boalt Hall), California

Richard Buxbaum, University of California at Berkeley School of Law (Boalt Hall), California
Robert Cole, University of California at Berkeley School of Law (Boalt Hall), California
James Crawford, University of California at Berkeley School of Law (Boalt Hall), California
Malcolm Feeley, University of California at Berkeley School of Law (Boalt Hall), California
David Feller, University of California at Berkeley School of Law (Boalt Hall), California
William Fletcher, University of California at Berkeley School of Law (Boalt Hall), California
Richard Jennings, University of California at Berkeley School of Law (Boalt Hall), California
Thomas Jorde, University of California at Berkeley School of Law (Boalt Hall), California
Herma Kay, University of California at Berkeley School of Law (Boalt Hall), California
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Richard Balnave, University of Virginia School of Law, Virginia
Thomas Bergin, University of Virginia School of Law, Virginia
Nancy Ehrenreich, University of Virginia School of Law, Virginia
Alex Johnson, University of Virginia School of Law, Virginia
Michael Klarman, University of Virginia School of Law, Virginia
Jane Levine, University of Virginia School of Law, Virginia
Richard Lillich, University of Virginia School of Law, Virginia
Daniel Ortiz, University of Virginia School of Law, Virginia
Gary Peller, University of Virginia School of Law, Virginia
Edward White, University of Virginia School of Law, Virginia

Michael Barbara, Washburn University School of Law, Kansas
James Concannon, Washburn University School of Law, Kansas
Myrl Duncan, Washburn University School of Law, Kansas
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Michael Kaye, Washburn University School of Law, Kansas

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William Rich, Washburn University School of Law, Kansas
Larry Sager, Washburn University School of Law, Kansas
Charlene Smith, Washburn University School of Law, Kansas

William Geimer, Washington and Lee University School of Law, Virginia
Roger Groot, Washington and Lee University School of Law, Virginia
Edward Henneman, Washington and Lee University School of Law, Virginia
Steven Hobbs, Washington and Lee University School of Law, Virginia
Gwen Johnson, Washington and Lee University School of Law, Virginia
Lewis LaRue, Washington and Lee University School of Law, Virginia
Andrew McThenia, Washington and Lee University School of Law, Virginia
David Millon, Washington and Lee University School of Law, Virginia
Brian Murchison, Washington and Lee University School of Law, Virginia
James Phemister, Washington and Lee University School of Law, Virginia
Joan Shaughnessy, Washington and Lee University School of Law, Virginia
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Robert Aronson, University of Washington School of Law, Washington
William Burke, University of Washington School of Law, Washington
Jane Ellis, University of Washington School of Law, Washington
Joan Fitzpatrick, University of Washington School of Law, Washington
Robert Fletcher, University of Washington School of Law, Washington
Deborah Greenberg, University of Washington School of Law, Washington
Gregory Hicks, University of Washington School of Law, Washington
Stewart Jay, University of Washington School of Law, Washington
Ralph Johnson, University of Washington School of Law, Washington
John Junker, University of Washington School of Law, Washington

Richard Kummert, University of Washington School of Law,
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Martha Lester, University of Washington School of Law, Washington
Arval Morris, University of Washington School of Law, Washington
John Price, University of Washington School of Law, Washington
Deborah Strigenz, University of Washington School of Law,
Washington
John Sullivan, University of Washington School of Law, Washington
Lea Vaughn, University of Washington School of Law, Washington
Louis Wolcher, University of Washington School of Law,
Washington

William Burnham, Wayne State University Law School, Michigan
Kenneth Callahan, Wayne State University Law School, Michigan
Joshua Dressler, Wayne State University Law School, Michigan
Beth Eisler, Wayne State University Law School, Michigan
Janet Findlater, Wayne State University Law School, Michigan
Gunther Handl, Wayne State University Law School, Michigan
Otto Hetzel, Wayne State University Law School, Michigan
Margo Lesser, Wayne State University Law School, Michigan
Geoffrey Lanning, Wayne State University Law School, Michigan
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Lawrence Mann, Wayne State University Law School, Michigan
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Vincent Cardi, West Virginia University College of Law, West
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Marion Crain-Mountney, West Virginia University College of Law,
West Virginia
Charles DiSalvo, West Virginia University College of Law, West
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John Egnal, Western New England College School of Law, Massachusetts
Robert Fleischner, Western New England College School of Law, Massachusetts
Anne Goldstein, Western New England College School of Law, Massachusetts
James Gordon, Western New England College School of Law, Massachusetts
Cathy Jones, Western New England College School of Law, Massachusetts
Amy Kligerman, Western New England College School of Law, Massachusetts
Anne O'Leary, Western New England College School of Law, Massachusetts
Arthur Leavens, Western New England College School of Law, Massachusetts
Bruce Miller, Western New England College School of Law, Massachusetts
Terry Nagel, Western New England College School of Law, Massachusetts
Barry Stern, Western New England College School of Law, Massachusetts
Keith Werhan, Western New England College School of Law, Massachusetts
Arthur Wolf, Western New England College School of Law, Massachusetts

Cindy Carson, Whittier College School of Law, California
Warren Cohen, Whittier College School of Law, California
Mary Gale, Whittier College School of Law, California
Elwood Hain, Whittier College School of Law, California
Denny Haythorn, Whittier College School of Law, California
William Patton, Whittier College School of Law, California
David Welkowitz, Whittier College School of Law, California

Robert Art, Willamette University College of Law, Oregon
Richard Breen, Willamette University College of Law, Oregon
Claudia Burton, Willamette University College of Law, Oregon

Kathy Graham, Willamette University College of Law, Oregon
Richard Hagedorn, Willamette University College of Law, Oregon
Bryan Johnston, Willamette University College of Law, Oregon
Susan Leeson, Willamette University College of Law, Oregon
Robert Misner, Willamette University College of Law, Oregon
James Nafziger, Willamette University College of Law, Oregon
Dean Richardson, Willamette University College of Law, Oregon
Ross Runkel, Willamette University College of Law, Oregon
Christopher Simoni, Willamette University College of Law, Oregon
Carlton Snow, Willamette University College of Law, Oregon
Robert Stoyles, Willamette University College of Law, Oregon
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Jayne Barnard, College of William and Mary, Marshall-Wythe School of Law, Virginia
Tom Collins, College of William and Mary, Marshall-Wythe School of Law, Virginia
Glenn Coven, College of William and Mary, Marshall-Wythe School of Law, Virginia
Glenn George, College of William and Mary, Marshall-Wythe School of Law, Virginia
Judith Ledbetter, College of William and Mary, Marshall-Wythe School of Law, Virginia
John Lee, College of William and Mary, Marshall-Wythe School of Law, Virginia
John Levy, College of William and Mary, Marshall-Wythe School of Law, Virginia
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Ann Althouse, University of Wisconsin Law School, Wisconsin
Richard Bilder, University of Wisconsin Law School, Wisconsin
Abner Brodie, University of Wisconsin Law School, Wisconsin
Peter Carstensen, University of Wisconsin Law School, Wisconsin
Arlen Christenson, University of Wisconsin Law School, Wisconsin
Carin Clauss, University of Wisconsin Law School, Wisconsin
Walter Dickey, University of Wisconsin Law School, Wisconsin
Howard Erlanger, University of Wisconsin Law School, Wisconsin
William Foster, University of Wisconsin Law School, Wisconsin
Marc Galanter, University of Wisconsin Law School, Wisconsin
Herman Goldstein, University of Wisconsin Law School, Wisconsin
Hendrik Hartog, University of Wisconsin Law School, Wisconsin
Stephen Herzberg, University of Wisconsin Law School, Wisconsin
James Hurst, University of Wisconsin Law School, Wisconsin
James Jones, University of Wisconsin Law School, Wisconsin
Leonard Kaplan, University of Wisconsin Law School, Wisconsin
John Kidwell, University of Wisconsin Law School, Wisconsin
Neil Komesar, University of Wisconsin Law School, Wisconsin
Lynn Lopucki, University of Wisconsin Law School, Wisconsin

James MacDonald, University of Wisconsin Law School, Wisconsin
Stewart Macaulay, University of Wisconsin Law School, Wisconsin
Marygold Melli, University of Wisconsin Law School, Wisconsin
Samuel Mermin, University of Wisconsin Law School, Wisconsin
Frank Remington, University of Wisconsin Law School, Wisconsin
Joel Rogers, University of Wisconsin Law School, WisconsinVicki
Schultz, University of Wisconsin Law School, Wisconsin
Gerald Thain, University of Wisconsin Law School, Wisconsin
David Trubek, University of Wisconsin Law School, Wisconsin
Frank Tuerkheimer, University of Wisconsin Law School, Wisconsin
June Weisberger, University of Wisconsin Law School, Wisconsin
William Whitford, University of Wisconsin Law School, Wisconsin
Zigurds Zile, University of Wisconsin Law School, Wisconsin

Mary Blackstone, University of Wyoming College of Law, Wyoming
John Burman, University of Wyoming College of Law, Wyoming
Marilyn Burman, University of Wyoming College of Law, Wyoming
Jerome Elkind, University of Wyoming College of Law, Wyoming
Robert Keiter, University of Wyoming College of Law, Wyoming
Debra Madsen, University of Wyoming College of Law, Wyoming
Peter Maxfield, University of Wyoming College of Law, Wyoming
Catherine Mealey, University of Wyoming College of Law, Wyoming
Mary Pridgen, University of Wyoming College of Law, Wyoming
George Rudolph, University of Wyoming College of Law, Wyoming
Joel Selig, University of Wyoming College of Law, Wyoming
Mark Squillace, University of Wyoming College of Law, Wyoming
Ann Stevens, University of Wyoming College of Law, Wyoming

Harlon Dalton, Yale Law School, Connecticut
Donald Elliott, Yale Law School, Connecticut
Lucinda Finley, Yale Law School, Connecticut

Elizabeth Clark, Yeshiva University, Benjamin N.Cardozo School of Law, New York
Donald Elfenbein, Yeshiva University, Benjamin N. Cardozo School of Law, New York
Arthur Jacobson, Yeshiva University, Benjamin N. Cardozo School of Law, New York
Michel Rosenfeld, Yeshiva University, Benjamin N. Cardozo School of Law, New York
David Rudenstine, Yeshiva University, Benjamin N. Cardozo School of Law, New York
Barry Scheck, Yeshiva University, Benjamin N. Cardozo School of Law, New York
Paul Shupack, Yeshiva University, Benjamin N. Cardozo School of Law, New York
Jonathan Silver, Yeshiva University, Benjamin N. Cardozo School of Law, New York

Katherine Stone, Yeshiva University, Benjamin N. Cardozo School of Law, New York

Telford Taylor, Yeshiva University, Benjamin N. Cardozo School of Law, New York

Lawrence Vogelman, Yeshiva University, Benjamin N. Cardozo School of Law, New York

Richard Weisberg, Yeshiva University, Benjamin N. Cardozo School of Law, New York

The **Chairman**. Now, we, in fact, start the morning with a distinguished panel. The first panel of witnesses this morning is here to discuss antitrust. I want to thank them for waiting. They were prepared to go last night. Because we could not finish in time last night, they agreed to come back this morning. I want to thank them very much for putting up with the inconvenience the committee has caused them.

The first is the Honorable Robert Abrams, Attorney General of the State of New York, a man of great distinction. I will not read his whole bio here, but a man whom we are very happy to have here; and the Honorable Charles Brown, Attorney General of the State of West Virginia and current chair of the Antitrust Committee of the National Association of Attorneys General; and Dean Robert Pitofsky, dean and professor of law at Georgetown University Law Center and former Commissioner of the Federal Trade Commission.

Gentlemen, would you all three stand to be sworn?

Do you swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Abrams**. I do.

Mr. **Brown**. I do.

Mr. **Pitofsky**. I do.

The **Chairman**. My colleagues will be in and out. We have one of those days on the floor of the Senate where there is a great number of amendments, and we will be interrupted constantly. But, hopefully, we can keep the day flowing and possibly straight through lunch, if I can get someone to spell me a little bit here, so we can finish the testimony today.

It is my hope and my goal to finish the public witnesses today and to have the transcript printed, the reports finished, so we can vote on Tuesday. But we will see how we go.

Let me ask you again, the closest to the 5-minute rule you can stay, we have four elected officials, Attorneys General, Congress persons and others to whom we have extended the courtesy of letting them go a little longer, but you would endear yourself to us greatly if you kept it at the 5-minute range.

With that, why do we not begin with you, Bob, General, and move from you to your left.

TESTIMONY OF A PANEL CONSISTING OF ROBERT ABRAMS, CHARLES BROWN, AND ROBERT PITOFSKY

Mr. **Abrams.** Thank you very much, Senator. I have submitted for the record the full transcript of my remarks, and I will condense them this morning.

Although I presently serve as president-elect of the National Association of Attorneys General and have recently completed a 3-year term as chairman of that association's antitrust committee, the views that I express here today are strictly my own.

Antitrust, the field in which Judge Bork has written extensively and authored several recent judicial opinions, offers an excellent insight into the claims of those who assert that he is a consistent advocate of judicial restraint. This claim is not supported by Judge Bork's antitrust record: neither in his scholarly writings where he has urged the courts to refuse to enforce certain antitrust statutes and to overrule many Supreme Court decisions in the antitrust area; nor in his decisions as a judge where he has reached far beyond the issues before him to propose a radical restructuring of long-standing principles of antitrust enforcement.

It should interest this committee to reflect on Judge Bork's view of Congress's role in developing antitrust policy. He has asserted that Congress is, and now I quote his own words, "institutionally incapable of the sustained, rigorous, and consistent thought that the fashioning of a rational antitrust policy requires."

He has further stated that the Supreme Court's "obligation to respond to the will of Congress on antitrust matters is an important and perhaps decisive institutional handicap, hindering its effort to make sensible law."

Supreme Court precedent on antitrust is also worthy of little deference in Judge Bork's view. He regards the landmark antitrust decisions of this century as wrong, and he ridicules the eminent Justices who authored those opinions.

Having essentially dismissed the views of Congress and the Supreme Court in the antitrust arena, Judge Bork proceeds to set forth his own view. He adopts a narrow standard which he states is the only legitimate goal of the antitrust laws, that of maximizing consumer welfare. This goal sounds perfectly reasonable, but upon examination, it deprives the antitrust laws of any of the political or social content written into them by the Congress.

It is necessary to understand what Judge Bork means by his term "consumer welfare" in order to understand how far his antitrust views depart from established law. At the heart of the matter is his peculiar and artificial definition of the term "consumer." In his view, corporations, even monopolists and price-fixers, are consumers, just as are the individual citizens who buy products in the marketplace.

Consumer welfare thus becomes, in his words, "the level of society's total wealth," and the only goal of antitrust enforcement, in Judge Bork's view, is to prevent restriction of the total output of goods and services.

Cartels or even monopolies are perfectly acceptable in Judge Bork's view as long as they do not cause restrictions in industrial output.

The theory guts the principal goal of the framers of the Sherman Act of 1890, which was to protect ordinary citizens from the power of monopolists and price-fixers to extract exorbitant prices from them. For Judge Bork, such a transfer of wealth from the purchasers of products to monopolists and price-fixers is merely a "shift in income between two classes of consumers," as he puts it, which does not lessen total wealth; and a decision about it could only rest, in his words, "on tenuous moral grounds."

Judge Bork's revision of legislative meaning and history is even less plausible when it is applied to the Clayton Act and succeeding antitrust statutes whose political, social and economic goals were even more clearly articulated.

The incipiency standard of the Clayton Act, aimed at curbing anti-competitive practices before they lead to oligopoly, is, to Judge Bork, nothing less than an "anti-competitive virus," his words.

The Celler-Kefauver Amendments of 1950 represent to Judge Bork "a jumble of half-digested notions and mythologies."

Turning to more recent legislation, Judge Bork has described the Hart-Scott-Rodino Act of 1976 as effecting "a destruction of national wealth not compensated by any social gain."

Of course, Judge Bork is entitled to have his opinion concerning the wisdom of these laws, but he takes the next improper step of advocating that courts should simply refuse to enforce them. He asks, for example, whether courts can rule that vertical mergers do not harm competition when Congress has said that they do. And he answers, "The issue is not free from doubt, but I think the better answer is yes."

His supporters may argue that the views outlined so far represent only Bork the scholar and not Bork the judge. Judge Bork's limited antitrust record on the court of appeals does not support this alleged dichotomy. Judge Bork's antitrust opinions display an eagerness to depart from the facts of the case at hand to expound upon his scholarly theories.

For example, in the 1986 *Neumann* case, Judge Bork took the occasion to expound his theories on predatory pricing and horizontal price-fixing. There were no such claims in the case, and on both topics Judge Bork departed from Supreme Court precedent.

In the 1986 *Rothery* decision, Judge Bork turned a straightforward case calling for a simple affirmance into a forum for expounding most of his major antitrust themes. In the *Rothery* opinion, Judge Bork made the following pronouncements:

He adopted a rule of per se legality for boycotts by firms without market power, contrary to a 1985 Supreme Court decision;

He reminded us that his concept of "consumer welfare" was the policy goal of the Sherman Act and that efficiency was the only relevant standard;

He rejected Supreme Court and D.C. Circuit precedents mandating a rule of reason balancing approach;

He stated that even if balancing were appropriate, it should be based on calculations of market share rather than actual market effects, contrary to the position taken by the U.S. Supreme Court the very day before in *Indiana Federation of Dentists.*

In her concurring opinion in *Rothery,* Judge Patricia Wald argued that a simple affirmance was in order and implied that

Judge Bork's opinion was excessive, asserting principles of law at variance with important precedents.

In conclusion, a fundamental role of the Supreme Court in our constitutional system of government has been the protection of individual rights against the arbitrary and unjust exercise of power by large institutions. In antitrust, Judge Bork sees no such role for the Court.

If you believe, as many in our nation do, that the antitrust laws serve as the Magna Carta of the free enterprise system, then you must view the realization of Judge Bork's antitrust agenda as a preventable tragedy.

But I think we all must agree that if such a monumental change in the law is to occur, it should only occur in our system of government as the result of a clear act of legislative will. Because Judge Bork would devote himself to advancing his own agenda in clear disregard of the will of Congress, I urge you to reject his nomination to the Supreme Court.

[The statement of Mr. Abrams follows:]

STATEMENT OF

ROBERT ABRAMS

NEW YORK STATE ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING

THE NOMINATION OF JUDGE ROBERT BORK

TO BE ASSOCIATE JUSTICE OF THE

SUPREME COURT

SEPTEMBER 29, 1987

Mr. Chairman, Senator Thurmond and members of the Committee. Thank you for this opportunity to testify on Judge Bork's nomination to be an Associate Justice of the Supreme Court.

I begin with a disclaimer. Although I presently serve as President-Elect of the National Association of Attorneys General and recently completed a two year term as Chairman of that Association's Antitrust Committee, I testify today only for myself.

I am the primary enforcer of New York's antitrust law and also represent my state, and its natural person citizens in federal antitrust litigation.[1]

I recently coordinated the filing of 37 federal antitrust suits by state attorneys general against the Minolta Corporation for an alleged vertical price-fixing conspiracy and successfully settled these suits on behalf of hundreds of thousands of consumers. I mention this only because Judge Bork has flatly stated that vertical price-fixing is beneficial to consumers, and should never be illegal and that the 76 year old precedent in Dr. Miles[2] which makes vertical price-fixing per se unlawful, may properly be "abandoned by the Supreme Court."[3] This explicit disagreement over vertical price-fixing may be one reason why Judge Bork is "dubious" about giving antitrust enforcement authority to state attorneys general. He stated that the Hart-Scott-Rodino Act of 1976, which conferred parens patriae antitrust jurisdiction on the attorneys general,effected a "destruction of national wealth (not) compensated by any social gain."[4]

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[1] 15 U.S.C. § 15c

[2] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[3] R. Bork, The Antitrust Paradox 298 (1978). Hereinafter referred to as "Paradox."

Judge Bork's reservations about state attorneys general extend to nearly every other enforcer of the laws and nearly every Supreme Court Justice who has interpreted them. But Judge Bork reserves his harshest criticism for Congress which he has termed "institutionally incapable of the sustained, rigorous and consistent thought that the fashioning of a rational antitrust policy requires."[5] He has also stated that "the Supreme Court labors under important and perhaps decisive institutional handicaps in its effort to make sensible law. It may sound perverse to describe the Court's obligation to respond to the will of Congress as an institutional handicap, but in a very real sense it is."[6]

If Judge Bork's view prevails, most of the antitrust law established during the last century will be abandoned, and the will of Congress frustrated. To understand both the magnitude of this revision and the method by which Judge Bork has proposed to achieve it, one must understand the single "legitimate" goal which he allows to the law, the goal of maximizing "consumer welfare." Few people realize that Judge Bork has made this phrase "consumer welfare" a term of art measured by two components, productive and allocative efficiency. This is highly technical stuff of which not a single member of the highly populist Congress which enacted the Sherman Act in 1890 had the slightest inkling [nor any economists at that time], nor did any of the Congresses which supplemented the antitrust laws in 1914, 1936 and 1950. It would astound them that preventing restricted output was their sole concern when enacting these laws. Under Judge Bork's definition of "consumer welfare" - monopolists, price-fixers and cartels are consumers as are the people who buy goods from those entities.[7] Furthermore, the so-called income redistribution from the buyer to the price-fixer or monopolist, which occurs when it raises price above the competitive level, is totally disregarded in the Bork "consumer welfare" model. Judge Bork has reasoned that this is merely "a shift in income between two classes of consumers (which) does not lessen total wealth, and a decision about it ... could only rest upon tenuous moral ground."[8] However tenuous morally, Senator Sherman and his colleagues clearly did make this choice. The Sherman Act was primarily aimed at preventing the extortion of income from buyers by monopolists.[9]

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[4] Paradox 6.

[5] Paradox 412.

[6] Paradox 409.

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[7] Paradox 110.

[8] Paradox 110-11.

Once this construct of "consumer welfare" is set up as the only "legitimate goal of antitrust" Judge Bork's dispatch of legislative will and precedent flows naturally, because the only ill which the law may "properly" address is restricted output.

Thus, *Dr. Miles*, the 1911 decision authored by Justice Charles Evans Hughes "must be rejected," even in the face of the Congressional repeal of fair trade laws, which affirmed Congressional will on this subject.[10] Judge Bork considers such action proper because he states that "the Sherman Act (is) not a set of specific rules, still less a body of precedent, but a direction to enforce the law's rationale. Precedent is not ultimately controlling; economic argument is."[11]

However, even if an antitrust court were limited to conducting an economic inquiry, *and it is not*, in any such inquiry there are many choices to be made about which economic factors to weigh. For example, Judge Bork has excluded from his "consumer welfare" formula any consideration of the wealth transfer effects of monopoly pricing.[12] Many economists do consider them.[13] The Bork economic model is also heavily biased toward the view that growth through merger usually increases productive efficiency. However, a recent major study supported by the F.T.C., Brookings and the National Science Foundation which tracked 6,000 mergers, suggests that mergers are, on average, productively inefficient.[14]

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[9] See generally, R. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L. Journal 65 (1982).

[10] *Paradox* 298.

[11] *Paradox* 36.

[12] *Paradox* 110-11.

Congress chose to make the antitrust formula a mixture of economic, social and political concerns, and this was its prerogative.

Judge Bork told this committee that his approach to statutory interpretation was guided by the "intention of lawmakers with appropriate respect for precedent." Let us examine this assertion.

In addition to Dr. Miles, most other landmark antitrust precedents are dismissed by Judge Bork, such as Justice Harlan's famous majority opinion invalidating the railroad cartel in the Northern Securities case,[15] which he states "would be thoroughly unimportant but for Justice Harlan's ineptitude in doctrinal disputation" and the equally famous dissent of Justice Holmes in the same case which was "uneven ... and a curiously inconsistent piece of work which deprives the Sherman Act of any general policy goal and, almost, of any intelligible reason for existence."[16] He also ridicules Justice Brandeis' classic formulation of the antitrust "rule of reason"[17] in Chicago Board of Trade, saying that it owes its longevity "a very great deal to its lack of conceptual clarity."[18] Judge Bork has summarized the Supreme Court's performance when he stated that "the Supreme Court (has) failed to understand and give proper weight to the crucial concept of business efficiency ... The results could not have been worse, and would probably have been better, if the Court had made the opposite mistake and refused to recognize any harm in cartels and monopolies."[19]

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[13] For example, F.M. Scherer, Industrial Market Structure and Ecomonic Performance, 471-473 (1980).

[14] D. Ravenscraft and F.M. Scherer, Mergers, sell-offs, and Economic Efficiency, book to be published in 1987 by the Brookings Institution.

[15] Northern Securities Co. v. United States, 193 U.S. 197 (1904).

There is at least one antitrust opinion which Judge Bork respects, that of then Circuit Judge Taft in the 1898 Addyston Pipe case,[20] which he calls "one of the greatest, if not the greatest, antitrust opinion in the history of the law." Of this opinion, Judge Bork wrote "he chose his common law cases carefully, however, and imposed upon them his own ideas. What emerged was not the restatement it pretended to be so much as a new structure ... (and) he rejected, in the guise of a discussion of common law cases, [Supreme Court Justice] White's reasonable-price standard as a sea of doubt".[21] The greatest opinion for Judge Bork is one in which a skillful Circuit Judge uses artifice to misrepresent his real agenda and contradict the Supreme Court.

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[16] Paradox 30-31.

[17] Chicago Board of Trade v. United States, 246 U.S. 231 (1918).

[18] Paradox 42.

[19] Paradox 8.

[20] United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898).

The rest of Judge Bork's equation for statutory construction concerns the "intention of the lawmakers."

However, Judge Bork has reinterpreted the legislative history of the Sherman Act as being devoid of any social or political objectives and to reveal as its only "legitimate" goal his construct of "consumer welfare" which he states "may ... quite legitimately be said to have been intended by the legislature, even though not a single member articulated it even to himself."[22] But this revision of legislative meaning and history becomes more difficult with the Clayton Act and succeeding enactments whose political, social and economic goals were more clearly articulated.

The Bork pronouncement on these statutes is predictable. The "incipiency" standard of the Clayton Act is in Judge Bork's words "an anticompetitive virus, working together with the

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[21] Paradox 26.

[22] Paradox 57.

Brandeis value strain to protect the inefficient from competition."[23]

The Robinson-Patman Act of 1936 which outlaws price discrimination, has in "the hands of the FTC and the courts ... been viciously anticompetitive ..."[24] The Celler-Kefauver Amendments of 1950 embody "the theory of the social and political purposes of antitrust (which) are to put the matter kindly, a jumble of half-digested notions and mythologies."[25]

Of course, Judge Bork is entitled to his opinion concerning the wisdom of these laws, but he takes the next improper step of advocating that courts should simply refuse to enforce them, stating:

> "Is a court that understands the economic theory free, in the face of such a legislative declaration, to reply that, for example, no vertical merger ever harms competition. The issue is not free from doubt, but I think the better answer is yes ...An analogous case would be presented if a particularly benighted legislature declared that poltergeists were the cause of many automobile accidents and that apparent negligence should be excused if ... poltergeists were responsible."[26]

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[23] Paradox 17.

[24] Paradox 64.

[25] Paradox 55.

[26] Paradox 410.

It has been asserted by Judge Bork and his supporters that Bork as scholar is not the same as Bork the judge. There is no support for this dichotomy in the limited antitrust record Judge Bork has compiled on the Court of Appeals.

For example in Neumann v. Reinforced Earth,[27] a 1986 decision rejecting a claim that the defendant was conducting sham litigation against its competitor in an attempt to achieve a monopoly, Judge Bork gratuitously called into question the antitrust rules which prohibit predatory pricing. However, there was no such claim in Neumann. That case merely served as a vehicle for one of Judge Bork's favorite themes as antitrust scholar. In Neumann, Judge Bork also announced that horizontal price-fixing by firms with small market shares is quite harmless - another of the Judge's scholarly positions, which finds no support in Supreme Court precedent and had nothing to do with the case before him.

In the 1986 decision of Rothery Storage v. Atlas Van Lines[28] Judge Bork completely discarded all judicial restraint and converted a simple opportunity to affirm the district court into a forum for expounding most of his major antitrust themes.

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[27] Neumann v. Reinforced Earth Co., 786 F.2d 424 (D.C. Cir. 1986).

[28] Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986).

In Rothery, Judge Bork did the following:

1) He adopted a rule of *per se* legality for boycotts involving firms without market power, contrary to a 1985 Supreme Court decision;[29]

2) He incorrectly reminded us that efficiency was the only concern of the Sherman Act;

3) He rejected the controlling Supreme Court and Circuit precedents which require a rule of reason balancing approach to determine the legality of the boycott alleged in Rothery. Instead he applied the doctrine of ancillary restraints, a cornerstone of Bork's scholarly theories about antitrust.

4) He then stated that even if a balancing approach were used to determine the legality of the boycott, anticompetitive effect could be demonstrated only if the defendant had market power. However, the Supreme Court had just taken the opposite position when in deciding Indiana Federation of Dentists[30] it reasoned that actual detrimental effects were the direct evidence for which market power analysis was merely a surrogate.[31]

In her concurrence in Rothery, Judge Wald quickly demonstrated that a simple affirmance was in order and that Judge

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[29] Northwest Wholesale Stationers' Inc. v. Pacific Stationery & Printing Co., 105 S. Ct. 2613 (1985).

[30] F.T.C. v. Indiana Federation of Dentists, 106 S. Ct. 2009 (1986).

[31] 106 S. Ct. at 2019.

Bork's opinion was excessive and asserted principles of law at variance with settled precedent.[32]

If confirmed, Judge Bork seems likely to attempt to swing the Supreme Court to the following specific antitrust positions, beyond his primary goal to make all antitrust cases an inquiry into efficiency considerations using market share data as the primary evidentiary tool.

1. All vertical price-fixing and all non-price vertical restraints of trade would be lawful.[33]

2. All conglomerate and vertical mergers would be lawful.[34]

3. All horizontal mergers would be permitted up to and including the point at which an industry was left with only three substantial firms, one of which could attain a 40% market share. This equates to a permissible HHI concentration ratio of roughly 3400, whereas both the Justice Department and the State Attorneys General Merger Guidelines now consider HHI of 1800 to be the threshold of high concentration and likely antitrust intervention.[35]

4. All tying arrangements and exclusive dealing arrangements would be lawful.[36]

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[32] 792 F.2d at 230.

[33] *Paradox* 288,297.

[34] *Paradox* 245, 262.

[35] *Paradox* 221-22.

[36] *Paradox*, 303,381.

5. Claims of predatory pricing and price discrimination would no longer be actionable.[37]

6. Horizontal price fixing and market allocation would be lawful if engaged in by sellers with roughly 40% or less market share, who were engaged in some other legitimate form of integration, such as joint advertising.[38]

If you believe as Judge Bork does that the administration of the antitrust laws during the last century has been worse than no law at all, you might welcome all of these radical steps.

If you believe, as I do, that though imperfect, the antitrust laws have, and continue to serve, their role as the "Magna Carta" of the free enterprise system and further important economic, social and political goals articulated by the Congress, then you should view this agenda as a preventable tragedy. But I think that we must all agree that if such a monumental change is to occur it should only occur in our system of government as the result of a clear act of legislative will. In the area of antitrust, Judge Bork has devoted himself to advancing his private agenda in clear disregard of the will of the Congress. For that reason I strongly urge you to reject his nomination!

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[37] Paradox, 401, 155.

[38] Paradox, 278-79.

The **Chairman**. Thank you, General.

General Brown.

TESTIMONY OF CHARLES G. BROWN

Mr. **Brown**. Thank you, Mr. Chairman.

I am Charles G. Brown, Attorney General of West Virginia. A major portion of my career has been spent as an antitrust enforcement official. I served as a staff attorney at the Federal Trade Commission under three chairmen. I then was the first director of West Virginia's antitrust program. I am now the chair of the Antitrust Committee of the National Association of Attorneys General, but the organization has taken no position on this nomination.

I am here today because I am concerned that the tools I now apply in the maintenance of a free market economy will be eliminated. The recent abandonment of market oversight by federal enforcement officials has been justified by reliance on the theories of efficiency originally authored by Professor Bork and other Chicago School adherents. The practical effect of the application of Professor Bork's ideas has been to allow unwarranted mergers and other historically recognized restraints of trade.

But it is one thing to endure an enforcement policy vacuum for a few years. It is quite another for the nation's highest Court to carve in granite a policy that requires the elimination of enforcement of both federal and State antitrust laws.

In his thesis on antitrust, called "The Antitrust Paradox," Professor Bork states that "The central institution in making antitrust law has been the Supreme Court." With this extensive power in hand, Professor Bork makes clear that he would use it to gut nearly a century of antitrust precedents.

I quote from his conclusion in "The Antitrust Paradox": "It would have been best if the courts, first confronted with the Clayton Act and later the Robinson-Patman Act, had said something along these lines: We can discern no way in which tying arrangements, exclusive dealing contracts, vertical mergers, price differences, and the like injure competition or lead to monopoly . . . We hold that, with the sole exception of horizontal mergers, the practices mentioned in the statutes, never injure competition and hence are not illegal under the laws as written."

Talk about judicial activism. This is a total disregard of the will of Congress. Those of us down in the trenches of day-to-day antitrust enforcement are astounded by these suggestions. Legalizing vertical price-fixing means an end to discount pricing for consumer goods. Many consumers in West Virginia and South Carolina and New Hampshire want or need to buy at discount stores, and they could no longer do so. And retailers would no longer have the freedom to set their own prices.

Here is another example. General Motors could acquire USX and buy all of its steel from its captive company.

If, as the Supreme Court has said, the antitrust laws are the Magna Carta of free enterprise, then Professor Bork's wholesale dismissal of vertical restraints is certainly the moral equivalent of a war on antitrust.

Judge Bork's desire to overturn federal antitrust case law has more than simply federal enforcement ramifications. This is because many State antitrust statutes, such as West Virginia's, specifically incorporate federal case law precedents as controlling on

State courts. Look at the impact. This year, Attorney General Abrams, to my right, a Democrat of New York, led the fight to return money into the pockets of American camera consumers due to resale price maintenance. And Attorney General Roy Zimmerman, Republican of Pennsylvania, acted promptly to block the merger of the two largest department stores in Pittsburgh.

We would see the institutionalization of non-enforcement on the federal level and the gradual erosion of this enforcement by the States. The real victims of a Bork antitrust era on the Supreme Court will be consumers, small business entrepreneurs, and mid-sized corporations. For the individual buyer and the bold business person, there will be nothing free about the market created by Judge Bork. Price-fixing and exclusive dealing will rule the marketplace. Innovative industrialists will be absorbed into the gray corporate giants.

Judge Bork's effect on antitrust law is simply not as conducive to a 10-second spot on the evening news, as are the other issues so hotly debate in the past few weeks. However, I submit to this committee that in no other area will the effect of a Bork appointment be so completely felt.

The short-run effect would be the squeezing of American pocketbooks and the draining of America's entrepreneurial spirit. The long-run impact would be to impede those principles of business freedom which Americans so deeply cherish.

Through its enactment and amendment of the antitrust laws over the past century, the Congress has taken the initiative to preserve economic liberty. I only hope that this committee will reaffirm that congressional commitment by voting against the confirmation of Judge Robert H. Bork.

Thank you, Chairman Biden.

[The statement of Mr. Brown follows:]

TESTIMONY OF
CHARLES G. BROWN
ATTORNEY GENERAL OF WEST VIRGINIA

Thank you, Mr. Chairman.

Before I begin this morning, I wish to emphasize that I appear here today only in my capacity as The Attorney General of West Virginia. Although I recently assumed the Chairmanship of the Antitrust Committee of the National Association of Attorneys General, my views are not meant to mirror any consensus of the NAAG organization on the Bork nomination.

A major portion of my career as a lawyer has been spent as an antitrust enforcement official. I was a staff attorney at the Federal Trade Commission under three chairmen--one democrat and two republican. Prior to being elected Attorney General, I was the first director of West Virginia's antitrust program.

My close association with the development of effective antitrust enforcement is what brings me here before you today. I am concerned that the tools I now employ to assist in the maintenance of a free market economy will be eliminated by a slant of the Supreme Court toward the antitrust philosophy espoused by Judge Bork.

Antitrust has been Judge Bork's main focus as an academic and as a member of the private sector, and therefore, I will not challenge directly the quality or depth of his scholarship. Moreover, the academic community and recent literature have already addressed many of the more esoteric aspects of his professional acumen. Rather, my concern before this Committee is to spark an examination of the broader implications of Judge Bork's views, and the practical results for antitrust enforcement of a Bork appointment.

Professor Bork finds the foundation for his antitrust views in the area of legal philosophy known as the school of "Law and

Economics," or the "Chicago School." For Judge Bork, an allegiance to the Chicago School philosophy has translated into an efficiency-based model of antitrust. Public Citizen, *The Judicial Record of Judge Robert H. Bork* (1987), 117-118. He finds that "the core of the difficulty [with present antitrust interpretations] is that the courts, and particularly the Supreme Court, have failed to understand and give proper weight to the crucial concept of business efficiency." R. Bork, *The Antitrust Paradox* 7 (1978). Although Judge Bork attempts to emphasize a belief on his part that the ultimate goal of the antitrust statutes is consumer welfare, this belief is, in fact, filtered by primary attention to the needs of business. *Id*, at 107-116.

The Chicago School teachings espoused by Judge Bork have already had a negative effect on the *enforcement* of antitrust at the federal level. For six and a half years the Department of Justice's Antitrust Division has maintained only a limited enforcement effort under The Sherman and Clayton Acts. The reduction in staff in the Antitrust Division has been one of the clearest indicia of the reduced antitrust effort. From 1980 to 1987, the number of attorneys serving in the Antitrust Division has fallen from 429 to 240. *Insight*, June 15, 1987, 9, 12. Economist, paralegal, clerical and secretarial staff, during the same time period, has fallen from 883 to 539. *Id*.

The actual number of cases brought by justice has also provided clear evidence of a limited enforcement policy. Professor Eleanor Fox, the eminent antitrust scholar at the NYU Law School, recently noted the effect of "Chicago School" policies on Department of Justice litigation statistics: "Between 1981 and 1985, [Justice] challenged only 28 mergers and almost all were settled upon the filing of a complaint along with a consent decree, requiring only minor divestiture or other obligations;" during that same period justice "brought only two civil and no criminal monopoly cases.., compared with 11 civil monopoly cases in the period from 1976 to 1980." *Id*.

The actions of market participants have also manifested a belief that antitrust enforcement has become a paper tiger. Professor Fox points this out by citing the growing number of mergers, and their size, during the past six years. She notes that, "[m]erger activity rose to a record level in each of the past four years. In 1983, the total number of mergers consummated was 2,533, the largest number since 1974. The 1983 merger deals amounted to $73.1 Billion and included 137 transactions worth $100 Million or more. In 1984, there were 2,543 mergers, worth $122.2 Billion, including 200 mergers worth more than $100 Million. In 1985, there were 3,001 mergers, which set a 12-year record and represented an 18 percent increase over 1984. The value of the transactions was $179.6 Billion, nearly 50 percent higher than in 1984. Of the 1985 mergers, 268 were valued at $100 Million or more and 36 were valued at or over $1 Billion." *Id.* In short, an allegiance to the theories of "efficiency" has left business free to engage in the anti-competitive mergers and other restraints of trade which previously had been addressed by adequate enforcement resources at the federal level.

The withdrawal of federal enforcement efforts over the past six and one half years has largely left it to the state attorneys general to enforce The Sherman and Clayton Acts, as well as their own state antitrust statutes. Despite limited resources, we have somehow managed to coordinate the efforts of individual states in order to maintain at least a minimal deterrent to anti-competitive practices on a nationwide basis. For instance, the lack of a federal effort left it to the Attorney General of New York to bring suit in Federal Court against the four major national brewers concerning their use of exclusive territories for the distribution of beer. *New York v. Anheuser Busch, Inc.*, 86 Civ. 2345 (E.D.N.Y. 1986). The federal enforcement vacuum also left it to the joint efforts of 35 states to bring the first national resale price maintenance litigation instituted by a governmental agency since 1980. *State of Maryland, et al. v. Minolta Corp.*, B86-613 (D. Md. 1986). This increasing role for the states has produced the benefit of coordinating the disparate resources of 50 sovereign units, but this growing efficiency would not be otherwise necessary given a legitimate federal antitrust effort.

Of course, I recognize that the particular policies of federal antitrust enforcement are the prerogative of those who are elected and appointed to carry out the federal executive role. But I believe a Bork appointment will have a detrimental effect not only on federal antitrust enforcement policies, but also on the ability of the states to enforce even their own antitrust statutes. After all, it is one thing to endure an enforcement policy vacuum at the federal level for four or eight years -- it is quite another to saddle the nations highest court, for a lifetime, with an economic philosophy which requires the elimination of almost all enforcement, both federal and state.

My substantive legal objections to a Bork appointment, from an antitrust perspective, are not based on some hypothetical, "swing-vote" analysis. I believe that Judge Bork will represent more than simply a ninth voice on Supreme Court antitrust decisions. His ascension to the Court would signal the beginning of the end of almost a century of antitrust case law and statutory development. Bork will not simply weigh in his opinion with the others on antitrust issues. Bork has shown that he has a definite agenda in this area of the law, and he will no doubt meet that agenda by seeking out the authorship of the Court's opinions on antitrust well into the next century.

It takes very little stretch of legal imagination to see how Bork's reactionary views of the economic world could begin to [illegible] the precedent of an overburdened Supreme Court. Judge Bork's eagerness to apply Chicago School rhetoric has already surfaced in Rothery Storage & Van Co., an opinion he authored while sitting on the D.C. Circuit Court of Appeals. Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2D 210 (D.C. Cir. 1986). The case was a simple one on its merits -- A national van line was held not to have perpetrated a group boycott against independent carriers by requiring the independents to deal exclusively with the national line. *Id*, 791 F.2D at 230. Yet, Judge Bork transformed this straightforward case into a platform for renouncing the long-held standards of evaluation used in horizontal restraints cases.

Judge Bork dismissed the rule of reason analysis as unnecessarily broad for deciding the type of case represented by *Rothery*. Instead, he opined that the entire case could be decided simply by looking at the market share of the companies involved. *Id*, 792 F.2D at 221. Since atlas had only 6 percent of the market, Bork reasoned that it was not possible for the company to have enough market power to eliminate competition. *Id*. He therefore attempts to create the assumption that the defendant's exclusive-dealing requirement grew out of a purpose of business efficiency. *The Judicial Record of Judge Robert H. Bork*, Public Citizen Litigation Group, August 1987, at 121. Of greater concern even than the test he fashions is the fact that this test is lifted almost directly from his book *The Antitrust Paradox*. See Bork, *supra*, at 90-115.

Judge Bork's opinion in *Rothery*, the only antitrust decision of any significance during his tenure on the D. C. Circuit, demonstrates the extent to which he will apply the Chicago School economic vision to cases which come before him. In his tome on antitrust, called *The Antitrust Paradox*, Professor Bork recognizes that, "The central institution in *making* antitrust law has been the Supreme Court." With this extensive power in hand, Professor Bork makes clear that he would use it to gut nearly a century of antitrust precedents:

> "It would have been best...if the Courts first confronted with The Clayton Act and later the Robinson-Patman Act had said something along these lines: We can discern no way in which tying arrangements, exclusive dealing contracts, vertical mergers, price differences, and the like injure competition or lead to monopoly. We certainly are unable to estimate the likelihood of such results in their incipiency. For these reasons, and since the statutes in question leave the ultimate economic judgment to us, we hold that, with the sole exception of horizontal mergers, the practices mentioned in the statutes, *never injure competition* and hence are not illegal under the laws as written."

Id, at 410-11.

Those who are not well versed in antitrust may not at first recognize the significance of this pronouncement. However, those of us down in the trenches of day-to-day antitrust enforcement are dumfounded by the implications. Bork, in essence, would discard whole sections of the antitrust statutes and the case precedents interpreting them.

Bork could not have made it more clear, in the passage quoted, that he would discard, if given the chance, the whole area of statutory law related to vertical restraints of trade. In fact, Justice Bork would only maintain very limited boundaries for all of antitrust enforcement:

> "(3) The law should be reformed so that it strikes at three classes of behavior:
>
> (A) The suppression of competition by horizontal agreement, such as the nonancillary agreements of rivals or potential rivals to fix prices or divide markets.
>
> (B) Horizontal mergers creating very large market shares (those that leave fewer than three significant rivals in any market).
>
> (C) Deliberate predation engaged in to drive rivals from a market, prevent or delay the entry of rivals, or discipline existing rivals."
>
> "(4) The law should permit agreements on Prices, territories, refusals to deal, and other suppressions of rivalry that are ancillary, in the sense discussed, to an integration of productive economic activity. It should abandon its concern with such beneficial practices as small horizontal mergers, all vertical and conglomerate mergers, vertical price maintenance and market division, tying arrangements, exclusive dealing and requirements contracts, "predatory" price cutting, price "discrimination," and the like. Antitrust should have no concern with any firm size or industry structure created by internal growth or by a merger more than ten years old."

Id. at 405-406.

More important than his personal antitrust agenda is Judge Bork's entire approach to the antitrust statutory structure. Often his scholarship seems less a search for original intent in The Sherman Act by a man employing judicial restraint, than it does the jettison of two thirds of the federal antitrust statutes and at least half of all antitrust case law precedents.

Professor Robert H. Lande recently pointed out the selective use of original intent by Judge Bork to support the premises of The Chicago School. R. Lande, "An Anti-Antitrust Activist?," *The*

National Law Journal, September 7, 1987, 13. Professor Lande noted that Bork's subtle definition of the phrase "consumer welfare," the central purpose of the antitrust statutes, has nothing at all to do with the avoidance of non-competitive wealth transfers from consumer to monopolist. *Id*, at 28. Instead Judge Bork defines consumer welfare as economic efficiency, thereby eliminating the distinction between those who purchase goods and services and the companies with market power that raise prices and thereby extract wealth from those purchasers. *Id*. As long as the monopoly in the particular market produces its goods or services more efficiently, Judge Bork is unconcerned that the result is higher prices for consumers. *Id*.

Judge Bork's application of Chicago school precepts to the definition of consumer welfare comes as no surprise. The disturbing aspect of his analysis is his manipulation of the legislative history of The Sherman Act to conform to his own economic philosophy. R. Bork, *supra*, 50-72. As Professor Lande notes in his article, "[Judge Bork] is mistaken in his belief that Congress understood [their concern over the higher prices consumers face as a result of monopoly pricing] to mean a desire to avoid economic inefficiency...[e]ven leading economists of the day had only a tenuous understanding of this concept." *Id*. Instead, Lande points out, the Congressional debates were filled with "value-laden condemnations of the wealth-extraction effects of monopoly pricing [which] show a much broader concern than with mere economic efficiency." *Id*. In essence, "Judge Bork tried to make the stock-holders of monopolies and cartels into honorary consumers; but the consumers that Congress wanted to protect comprised only purchasers of goods and services." *Id*.

The bottom line reads clearly that Judge Bork is not likely to be a strict constructionist on antitrust at all. As Professor Lande so eloquently puts it, "[m]oderates and liberals may have little to fear from a true strict constructionist since such a justice would impartially implement Congress' original intent...Judge Bork, however, saves his narrow view of a Judge's role for instances when this posture is consistent with his preferred ends. In other cases he finds a way to reach the result demanded by his ideology and denounces contrary conclusions as 'unconstitutional.'" *Id*.

As a State Attorney General, I believe I could weather the Borkian effect on federal antitrust law if it only perpetuated the federal enforcement vacuum that the states have already endured for six and one-half years. However, Bork's convenient dismissals of both federal antitrust case precedents and the original intent of The Sherman Act have more than simply *federal* enforcement ramifications. This is because many *state* antitrust statutes, including West Virginia's, specifically incorporate federal case law precedents as controlling on the state courts. WV Code 47-18-16; *Anziulewicz v. Bluefield Community Hospital*, 531 F.Supp. 49 (S.D.W.Va. 1981). The conceptual dismemberment, by a Bork-influenced Court, of fundamental federal antitrust concepts would spontaneously become state law by virtue of these incorporation sections of the state statutes. The ultimate effect, as on the federal level, will be to erode enforcement under state antitrust laws as well. Unlike surviving the policy of a particular executive administration, such changes, if instituted by the Supreme Court, will remain immutable for a generation or more. I do not think it extreme to say that antitrust, as it has been practiced since its inception, will no longer exist as a tool for maintaining the health of the national economy or the economies of the individual states.

I would argue that the end result of a Bork nomination will be the institutionalization of non-enforcement on the federal level and the eventual erosion of any meaningful action by the states. However, the real victims of a Bork antitrust era on the Supreme Court will be consumers, the small business entrepreneur, and mid-size corporations. For the individual buyer and the intrepid business person, there will be nothing "free" about the market created by Judge Bork. Price-fixing and exclusive dealing will rule the market place, and innovative industrialists will be absorbed into the gray corporate giants.

In a Borkian marketplace, sprawling industrial behemoths, like L-T-V, will be "free" to swallow their rivals, and then wallow in bankruptcy while retired workers are left high and dry. Yesterday's management will be entrenched in the nation's boardrooms, "free" to employ the survival tactics of corporate buy-out, instead of the strategies of industrial renewal.

In summing up today, let me emphasize that I am not in the habit of preaching doom. Nor is this Committee likely to see a host of other antitrust supporters carrying placards in the streets of Washington. Judge Bork's effect on antitrust law is simply not as conducive to a ten second spot on the evening news as are the other issues so hotly debated in these past weeks.

However, I submit to this Committee that in no other area will the effect of a Bork appointment be so completely felt. Although he may be able to dodge questions about privacy rights and affirmative action with a nod to the hypothetical nature of such interrogations, I do not believe that Judge Bork is likely to repudiate the antitrust views which he has so meticulously crafted over the entire course of his professional life.

The short-run effects of a Bork appointment will be felt in the squeezing of consumer pocketbooks and the draining of America's entrepreneurial spirit. In the long-run, the application of Borkian antitrust principles to the U. S. marketplace will only serve to impede those principles of business freedom which Americans have always demanded. Through its enactment and amendment of the antitrust laws over the past nine decades, this Congress has taken the initiative to preserve this economic liberty. I only hope that this Committee will reaffirm that Congressional commitment by voting against the confirmation of Judge Robert H. Bork.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, General.
Dean Pitofsky.

TESTIMONY OF ROBERT PITOFSKY

Mr. PITOFSKY. Thank you, Senator Biden.

I have thought a good deal about what I could possibly say in a short time that would be helpful to the committee in examining Judge Bork's record. I will this morning only touch on two themes: First——

Senator METZENBAUM. Bring your mike closer.

The CHAIRMAN. The microphone. It is the middle one. You have to speak right into it.

Mr. PITOFSKY. First, even among conservatives, Judge Bork is rather extreme in his criticism of antitrust policy; second—and I think more important—when you examine Judge Bork's scholarship and his work in the antitrust field, it is striking to see his willingness to substitute his views in the face of contrary legislative history and precedent.

Now, it has been said and will be said that Judge Bork is a bold and brilliant scholar—which is true, in my opinion—and that he has been influential in molding the antitrust policy of the 1980's, which is also true. But I suggest that those are not really the issues that should be decisive here.

It is not a question of whether Judge Bork is an insightful scholar, but, rather, where that scholarship leads him. I would point out that it leads to an extraordinarily conservative attitude toward antitrust. Judge Bork has been candid about what he thinks antitrust policy should consist of. It is price-fixing enforcement—and, of course, no one disagrees with that; merger enforcement against very large horizontal mergers; and some enforcement against predation, although he defines predation in such a way that you will hardly ever encounter it in the real world.

All of the rest of antitrust, scores of cases decided by the Supreme Court in the last 50 years, would be abandoned. There would be no enforcement against conglomerate mergers, virtually none against vertical mergers, no boycott enforcement, no enforcement against vertical agreements like resale price maintenance and tie-in sales—even though tie-in sales are expressly covered in the Clayton Act—no price discrimination cases.

I emphasize the word "abandoned." There are many conservative critics who have argued, and I have argued myself on occasion, that antitrust policy should be relaxed, should be eased, should be adjusted. Virtually no one argues the way Judge Bork does that it should be completely abandoned to such a great extent.

Now, how does he get to this position? The linchpin of his argument is that only economics counts; that any a "political considerations"—for example, the possibility that massive concentration will threaten the stability of the political process—is irrelevant. And when it is pointed out to Judge Bork that there are cases and much legislative history that go the other way, he is again quite candid. He says that only economics counts and that is all he is going to pay attention to.

In a program in New York just 6 months ago—I emphasize the date; this is not a seminar at Yale 20 years ago—when challenged that legislative history demands a political dimension to antitrust enforcement, Judge Bork said, "If everything said by the proponents of multiple goals, of political goals of antitrust, if all of that were true, it would not matter. I would not be bound to follow it," because of his view of the constitutional doctrine of separation of powers.

Why does he take that position? Well, Attorney General Abrams has already cited the quote that I think is critical: He has expressed a fundamental disdain for the ability of Congress to legislate in the economic field or to understand economics, and a view that the courts have been weak and spineless in going along with Congress' silly laws in this area.

Let me try to bring his views into focus with one final hypothetical, and I emphasize it is a hypothetical. I do not think this would happen in the real world. But suppose as a result of mergers and acquisitions, we ended up in this country with just five or six mammoth corporations serving every market. Judge Bork's view of that situation would be that there is nothing wrong with it. There is no reason for conglomerate or vertical concerns, and horizontal concerns are addressed if there are three or four companies left.

One could argue about that. I think that is dead wrong. But more important for this committee, I emphasize this point——

The CHAIRMAN. Dean, for those who are listening, explain the difference between horizontal and vertical in terms of antitrust.

Mr. PITOFSKY. Horizontal mergers are mergers between direct active competitors. Judge Bork believes that cases like that should be brought.

The CHAIRMAN. You mean, for example, Ford and Chrysler?

Mr. PITOFSKY. Yes. Although I am not sure he would bring that particular case because combined market shares would not amount to 40 or 50 percent of the market. GM and Chrysler would be challenged; but maybe Ford and Chrysler would get through under Judge Bork's views.

Vertical mergers are between buyers and sellers; U.S. Steel, say, and General Motors. Conglomerate mergers are between unrelated companies. He would drop enforcement in the last two areas.

Where does abandonment of enforcement in those areas lead? If we ended up in this country with five gigantic, mammoth corporations, Judge Bork would say, "So what? Economics really should not be concerned about that." And if told, "Well, that may be your view of economics, but Congress probably would be uncomfortable with that situation," he would say, "I do not have to follow Congress' will in this area because the antitrust laws are so general. And besides, Congress really does not understand what they are doing in legislating in the antitrust field."

I would think that view ought to give members of the Senate some concern.

Thank you.

[The statement of Professor Pitofsky follows:]

TESTIMONY

of

ROBERT PITOFSKY

Professor of Law and Dean

Georgetown University Law Center

Before The

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

Concerning

CONFIRMATION HEARINGS ON ROBERT BORK

September 29, 1987

I appreciate the opportunity to testify in these exceptionally important hearings considering the confirmation of Robert Bork as a Justice of the Supreme Court.

I intend to discuss Judge Bork's record as a scholar and judge in the field of antitrust. I will emphasize two themes: first, that Judge Bork in the antitrust field is an activist of the right, ready and willing to substitute his views for legislative history and precedent in order to achieve his ideological goals; and, second, even when examined by comparison to other conservative critics of antitrust enforcement, his views are extreme.

It is important to examine Judge Bork's views concerning antitrust carefully. He has taught and written in that field extensively, and has described it as a microcosm for the rest of what goes on in society.[1] If his views on antitrust reflect a general attitude about the role of the legislature in setting policy in this country, then his appointment would threaten the delicate balance among the legislative, executive, and judicial branches that is at the heart of the American constitutional system.

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[1] R. Bork, The Antitrust Paradox: A Policy at War with Itself, 10 (1978) ("Antitrust Paradox").

Let me emphasize that my reservations about this nomination are a matter of policy -- i.e., questions about Judge Bork's views of the role of law and of judges in a constitutional system and his views about antitrust enforcement. My remarks are not intended as a personal attack on Robert Bork. On the contrary, he has been an exciting and dynamic law professor and a brilliant and influential scholar in antitrust and other fields. He is also a man of great personal integrity. Nevertheless, I believe confirmation of his nomination to the Supreme Court would be a mistake.

1. The Goals of Antitrust. Judge Bork has consistently adhered to an extremely conservative view of antitrust enforcement. In his writings, he has advocated that the only business activities that should violate the antitrust laws are price fixing and market division among competitors, horizontal mergers among extremely large companies, and predatory (that is, intentionally exclusionary) business conduct. All of the rest of antitrust -- the subject of bipartisan support for almost 50 years -- would be eliminated.

Judge Bork's views are based on his conclusion that Congress, in enacting the antitrust laws, was solely motivated by a concern with "allocative" efficiency, which he likes to call "consumer welfare." This is a technical economic label and is somewhat misleading; for example, if a particular "efficient" practice enriched only producers and not consumers, conservatives would still say the practice enhanced "consumer welfare."

One of Judge Bork's important pieces of scholarship was an article published in 1966 in which he reviewed the legislative history of the Sherman Act and concluded that the intent of the legislators who enacted that law was solely to achieve beneficial economic results.[2] But it is undisputed that economists had virtually nothing to do with the drafting of or debate about that statute. Other scholars, reviewing the same legislative history, have concluded that Congress was motivated by broader concerns that concentrated economic power would threaten the opportunities of individuals and small businesses, and eventually undermine a private enterprise system.[3]

Even if the legislative history preceding the Sherman Act is obscure, Judge Bork's "only economics matters" approach to antitrust interpretation runs into trouble when applied to post-Sherman Act legislation. The enactment of the Clayton Act (at the climax of

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[2] Bork, Legislative Intent and the Policy of the Sherman Act, 9 J Law and Econ. 7 (1966).

[3] See H. Thorelli, The Federal Antitrust Policy, 180 (1955); W. Letwin, Law and Economic Policy in America, 59 (1965).

Wilsonian economic reform in 1914), the Robinson-Patman Act in 1936 which was plainly designed to assist small business, and the amendment of Section 7 of the Clayton Act in 1950 to deal with the political consequences of what Congress saw as a rising tide toward industrial concentration cannot be explained solely in economic terms.

The legislative histories of those statutes reveal concern about many "political" issues. For example, there was concern about industrial concentration because it would create opportunities, in time of domestic stress or upheaval, for the overthrow of democratic institutions, and would invite greater levels of government intrusion into the affairs of a free enterprise system because government would be unable to leave giant firms in concentrated markets politically unaccountable.[4]

To be sure, several commentators on antitrust believe that legislative history in the antitrust field is not all that clear, and adopt an exclusively economic interpretation of the broad language of the antitrust statutes. But Judge Bork does not insist on an exclusively economic interpretation of the antitrust laws solely because he believes intent is uncertain. In a paper delivered at a conference in New York last spring he examined the issue upon the assumption that Congress really wanted non-economic concerns to be relevant to the interpretation of the antitrust laws. Judge Bork then described his position:

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[4] For discussion of these themes and their role in the legislative histories of the federal antitrust laws, see Pitofsky, The Political Content of Antitrust, 127 U.Pa. L. Rev. 1051, 1052-65 (1979).

> "But I want to go further, and urge that if all of these arguments that I have made in the past and which I skim over here did not exist, and if everything said by the proponents of multiple goals, of political goals, of the antitrust laws, if all of that were true, it would not matter, once it is admitted that is, if Congressmen explicitly said they wanted courts to weigh political values against the economic welfare of consumers, it would not matter. Once it is admitted that a major component of antitrust policy is the welfare of consumers, and I think almost everyone admits that, it follows, I think, that consumer welfare must be the exclusive goal of the law.
>
> And the argument here, of course, is constitutional and I am speaking about separation of powers. We all know that the separation of powers often requires courts to refuse to do things that Congress explicitly directs them to do."[5]

While worded in a rather extreme fashion, Judge Bork's statement of the right of judges under the Constitution to ignore the will of Congress is consistent with a lifetime of thought on the subject.

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[5] Remarks of Hon. Robert Bork at Conference Anticipating Antitrusts Centennial at 4 (Nov. 15, 1986).

In his view, if a particular judgment of Congress is "wrong" or difficult to implement (in a Judge's view), the Judge is free for those reasons alone to ignore it.

Underlying all of this thinking is a fundamental disdain for the competence of Congress and the Supreme Court to understand economics and apply its principles. In his "Final Thoughts" chapter of The Antitrust Paradox, he asserts that both Congress and the Supreme Court are to blame for the decay of the antitrust laws.[6] The Supreme Court operates under the "handicap" of having to respond to the will of Congress, itself subject to popular whim.[7] But still, he argues, when presented with enactments of Congress that require it to develop rules to govern practices that Congress believed injured competition -- but which Judge Bork is persuaded cause no such injury -- the court simply should have refused.[8]

Congress as an institution, according to Judge Bork, is "incapable of the sustained, rigorous and consistent thought that the fashioning of a rational antitrust policy requires."[9] This is largely because of its size and its susceptibility to interest group influence, and the "strong element of anti-corporate populist sentiment" which Bork acknowledges is reflected in the views of the electorate.[10]

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[6] Antitrust Paradox at 408-13.

[7] Id at 409.

[8] Id at 410.

[9] Id at 412.

Let me try to sharpen the focus on this issue. In effect, Judge Bork has said that even if he received incontrovertible proof that every legislator who ever addressed the question -- in enacting the Sherman Act in 1890, the Clayton Act in 1914, and amending the Clayton Act in 1950 -- believed that the drawing of the line separating legal from illegal business arrangements should take into account the effect of industrial concentration on the political process, he would not feel bound to accept that view.

That interpretation follows from the fact that Congress' concern about political values was misplaced and difficult to implement, and that the courts in the past have been spineless in not resisting these foolish ideas. It it is odd that these are the views of a judge reputed to advocate "original intent and judicial restraint."[11] In the antitrust field where the legislative intent and much precedent may reflect values that Judge Bork does not respect, he has found a way to ignore them.

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[10] Id at 413.

[11] Of course, the antitrust laws are not parts of the Constitution, but they frequently have been referred to as constitutional in scope. See Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).

I realize that Judge Bork in these hearings has testified that he would go along with the will of Congress in the antitrust field, even though he thought Congress' legislative judgment was mistaken. Specifically, Senator Specter asked Judge Bork how he would handle challenges to price discrimination under the Robinson-Patman Act -- a practice that Judge Bork has urged is efficiency-creating or innocuous:

> "A. You have to enforce it. It's -- you may not like it but you've got to enforce it."

Later, in response to the same line of questioning, Judge Bork said:

> "A. . . . I'm out there to follow Congress' intentions. And when Congress has delegated to a judge, to the courts, the task of deciding when competition is threatened and when it isn't, you do the best you can. On the other hand, if Congress says this thing threatens competition -- strike it down, I have to do that even if I don't think it threatens competition."[12]

Judge Bork's response to Senator Specter's questions may well represent his present view of the question of a judge's responsibilities to enforce acts of Congress. I must point out, however, that his current position represents a change of emphasis from statements made a few years ago.

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[12] New York Times, September 20, 1987, p. 50, col. 4-5.

When questioned on the subject of Robinson, Patman enforcement, Judge Bork pointed out that the Robinson-Patman Act outlaws price discrimination only when it injures competition, and that "There is never a price discrimination that injures competition."[13] In explaining why a judge should not enforce the Act, he said:

> "If the legislators tell a judge what to do, of course he has to do it, no matter what his personal views. But the Robinson-Patman Act does not do that. There is a theory that Congress did not mean what it said in the Robinson-Patman Act; that it said protect competition but really meant protect small business. That is the theory that Congress winked at when it enacted the statute. I do not think it is a judge's business to enforce a legislative wink. That would be to help a legislature evade its proper political responsibility."[14]

In short, Judge Bork's assertion and testimony here that he would enforce the Robinson-Patman Act must be qualified by his assertions that it need be enforced only where there is an injury to competition, and he believes that price discrimination -- the primary practice covered by the Robinson-Patman Act -- never injures competition.

2. Attitudes Toward Antitrust Precedent. Judge Bork's views discussed to this point were advanced when he was a law professor, and a scholar has the right

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[13] The Conference Board, p. 9 (March 3, 1983).

[14] Id.

(even the duty) to be original, unconventional and provocative. It might be thought that Judge Bork on the bench would be less inclined to introduce into opinions his special views about antitrust.

It is difficult to evaluate Judge Bork as an antitrust judge. Few antitrust cases have been heard by the District of Columbia circuit since Judge Bork joined that court. His most ambitious opinion -- writing for the court in Rothery Storage and Van Co. v. Atlas Van Lines, Inc.[15] -- shows Judge Bork as remarkably energetic in inserting his special views about antitrust into a judicial opinion.

The case involved arrangements among agents of a moving van company which accounted for only five or six percent of the market. Judge Bork concluded (as did the trial judge and his fellow judges on the District of Columbia panel) that the transaction was reasonable and therefore legal.

The result in Rothery is not troublesome, but the reasoning employed to reach that result is worth examining. First, Judge Bork concluded that it was inconceivable that any practice engaged in by a company with as small a market share as Atlas could have any economically significant adverse effects. That is a central tenet of Judge Bork's scholarly writing, but hardly an established principle of antitrust law. Indeed, about the same time Judge Bork's Rothery opinion was published, the Supreme Court decided FTC v. Indiana Federation of Dentists[16] and unanimously held that a small market share was not controlling in cases in which the challenged practices were sufficiently anticompetitive.

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[15] 792 F.2d 210 (D.C. Cir. 1986), cert. denied, 107 S. Court 880 (1987).

Second, in Rothery Judge Bork also stated his view that only economics matters, asserting that the Supreme Court had adopted this controversial view, although the Court had never said anything of the kind. Finally, he asserted that two Supreme Court cases which included reasoning that was inconsistent with his analysis -- Topco[17] and Sealy[18] -- have been in those respects "effectively overruled."

Judge Bork may turn out to be right in all of his assertions incorporated in his Rothery opinion. Nevertheless, none of these assertions is settled, and the technique of declaring Supreme Court cases "effectively overruled" when the Court itself has not said so is certainly aggressive. It would underestimate

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[16] 106 S. Court 2009 (1986).

[17] United States v. Topco Associates Inc., 405 U.S. 596 (1972).

[18] United States v. Sealy Inc., 388 U.S. 350 (1967).

Judge Bork's strong commitment to his special views about economics and economic regulation to expect that he would do anything on the Court except to attempt to implement his views in the course of deciding cases and writing opinions, despite legislative history and contrary precedent.

3. Antitrust Views. If Judge Bork's vision of antitrust prevails, the range of permissible conduct open to businesses in this country would be much broader than is presently the case.

As a result, it is likely that this would be a very different country. Large firms could behave far more aggressively against rivals without fear of monopolization charges, each industry could become concentrated by merger to the point where only two or three firms remained, and wholesalers and retailers would be under the thumb of their suppliers as to where and at what price they can sell and what brands they can carry. Firms might continue to display vigorous competitive characteristics, but that would only be as a result of market forces. The antitrust laws would not be available as a check should market forces fail to work properly.

In Antitrust Paradox, Judge Bork was admirably clear in stating his view that only three classes of behavior should be illegal under the antitrust laws:

a. horizontal agreements to suppress competition by fixing prices or dividing markets;

b. horizontal mergers that leave fewer than three significant rivals in a market; and

c. predatory practices intended to drive out rivals, raise barriers to entry, or punish actions by rivals already in the market.

Everyone agrees that horizontal agreements to fix price or divide markets should be illegal. But virtually all of the rest of antitrust enforcement is abandoned. To gain an appreciation of how radical these views are, one should look at what would not be illegal in Judge Bork's view.

a. Horizontal mergers. Judge Bork has written that mergers with combined market shares of 60 or 70% should be permitted as long as two or three firms remain in the market, but, as a "tactical concession," concluded that a 40% cutoff line would be appropriate.

This Administration has been more lenient in its merger enforcement policy than any in 50 years, but Judge Bork's views make the current Administration's policies seem recklessly restrictive. Judge Bork's approach would permit, for example, mergers of Exxon and

Texaco in the oil industry; U.S.X. and Bethlehem in the steel industry; and Miller and Coors in the beer industry. Pepsi-Cola's attempt to acquire Dr. Pepper and Coca-Cola's bid for 7-Up, which the Administration successfully challenged, probably would have sailed through if Judge Bork's rules applied. It is doubtful that the merger of LTV and Republic Steel, which this Administration also successfully challenged, would even have been investigated.

We would see a different sort of country if companies in every segment of the economy were permitted to merge down to two or three giant firms without fear of antitrust exposure. Perhaps the economy would be more efficient as Judge Bork expects, although that seems doubtful. But the political consequences of that kind of economic concentration, which Judge Bork (but not Congress) dismisses as irrelevant, would be considerable.

b. Vertical and conglomerate mergers. Judge Bork believes that conglomerate and vertical mergers are rarely appropriate targets for antitrust review. He argues that such combinations are entirely efficiency creating[19] and harmless to competition because they merely internalize within the firm transactions that otherwise would occur in the market.[20]

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[19] Antitrust Paradox at 226.

In fact, antitrust enforcement against vertical and conglomerate mergers has become more lenient, partly because of the scholarly criticism by Judge Bork and others of previous unduly restrictive opinions. But the courts have not suggested that vertical and conglomerate mergers never (or almost never) produce anticompetitive effects. Judge Bork's rather single-minded focus on "efficiency" leads him to take a more extreme position than those who would argue for a more lenient approach.[21]

c. Resale price maintenance. Under present law, an agreement between a manufacturer and its distributors specifying the price at which the distributor must sell is illegal. Partly because of Judge Bork's insightful scholarship, there has been a lively debate in the literature as to whether an absolute rule of illegality should apply, or whether a more flexible balancing test (called a "rule of reason") would be more appropriate.[22] When the Supreme Court has been asked to overrule its earlier position that resale price maintenance is illegal *per se*, it has either explicitly ratified its earlier strict view[23] or declined to entertain the question.[24] For most commentators then the question is whether there should be a rule of strict, or *per se*, illegality or a balancing test. Judge Bork, more extreme again, urges a rule of absolute legality.

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[20] Id at 227.

[21] In Antitrust Paradox, Judge Bork admitted the "faint theoretical" possibility that a truly vertical merger might be a tool of predation for some firms. Antitrust Paradox at 226. But he would declare such mergers unlawful under Section 2 of the Sherman Act (that is as "monopolizing") only "when the acquiring firm has at least a market share of, say 80% and specific intent to monopolize can be proved." Id at 238, note* (emphasis in original). That is the practical equivalent of declaring vertical mergers legal per se.

Why should manufacturers have the right to control the price at which their dealers sell? In Judge Bork's view, higher prices will permit distributors to provide more services, and manufacturers have a better sense of which services consumers prefer. If the manufacturers are prevented by the antitrust laws from keeping prices high, price cutting discounters will drive service-oriented establishments out of the market.

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[22] Compare Posner, *Antitrust Policy in the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 Colum. L.Rev. 282, 283-99 (1975) with Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 Georgetown L.J. 1487 (1983).

Dr. Miles Medical Co. v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911).

[23] *Continental T.V. Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977) (51 n. 18).

[24] *Spray Rite Service Corp.* v. *Monsanto Co.*, 462 U.S. 752 (1984).

The conservative analysis has many flaws. First, it is difficult to follow why required higher prices will lead to more services and not simply to the pocketing of profits by manufacturers and dealers. Second, it may be somewhat outdated to argue that discounters provide few or no services. Third, if services really are desired, it is hard to see why the manufacturer would have a better sense of that than retailers who are closer to the consumer market. Finally, one can't help wondering why required higher prices to consumers (at best, to insure the provision of services that many of them don't want) is an example of "consumer welfare."

Even if Congress and the Supreme Court have been wrong for decades in their hostility to resale price maintenance, it is worth noting that Judge Bork's solution is not a flexible rule of reason but _per se_ legality. It is another example of why Judge Bork, even among conservative antitrust analysts, can be regarded as extreme.

d. _Other vertical restraints_. Aside from vertical price fixing, there is a wide assortment of other restrictions that manufacturers occasionally seek to place on their dealers. For example, dealers can be directed as to where they can sell ("territorial allocation"), what lines of product they may carry ("exclusive dealing"), and what other products they must carry as a condition of taking a particular brand ("tie-in sales"). All of these arrangements are subject under current law to various kinds of balancing tests, and are legal or illegal depending on the size of the manufacturer, duration of the contract, business reasons for the arrangement, and other factors.

Once again, Judge Bork recommends sweeping away decades of Supreme Court law on the subject and would declare all vertical contractual arrangements legal per se.[25] The result would be a distribution system in which wholesalers and retailers could be placed almost entirely under the thumb of their suppliers, and a market in which producers of new products could find it difficult to begin business unless they undertook distribution of their own products. Bork's view, more extreme than any suggested in any Supreme Court decision, would simply abolish antitrust enforcement in all of these areas.

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[25] Antitrust Paradox at 299, 309.

Conclusion

For almost 100 years, antitrust has served the country well by checking the tendency in a market economy toward concentration of economic power without unnecessarily stifling innovation and efficiency. There are important differences about the merits of particular policies, but the essential features of antitrust enforcement have enjoyed wide bipartisan support.

Robert Bork has challenged the central logic of antitrust enforcement efforts. It has been said in his defense that his scholarship is formidable (which it is), and that it has been influential at enforcement agencies and the courts (which it has).

But that's not the point. The question should be where does his scholarship lead. In Robert Bork's case it is to an antitrust program more conservative than proposed by almost anyone else. He supports anticartel efforts and would abandon almost all of the rest of antitrust. When challenged that his minimalist program is inconsistent with the will of Congress and with scores of Supreme Court cases, he has derided the ability of Congress to think clearly about economic regulation and he has urged that precedent inconsistent with his views be ignored. The claims on behalf of Judge Bork that he is a respecter of the will of the legislature and an exponent of judicial restraint are difficult to maintain when his record in the antitrust field is taken into account.

The CHAIRMAN. Before I begin my questioning, Mr. Maxwell Blecher, a well-known antitrust lawyer from Los Angeles, who was here yesterday to testify on this panel, could not stay today, and his statement will be placed in the record after Dean's comments.

[The statement of Mr. Blecher follows:]

STATEMENT OF MAXWELL M. BLECHER IN OPPOSITION TO THE NOMINATION OF JUDGE ROBERT H. BORK AS ASSOCIATE JUSTICE OF THE SUPREME COURT

I practice law in Los Angeles with Blecher & Collins and am one of the founding directors of the Committee to Support the Antitrust Laws ("COSAL").[1/] I thank the Chairman and the Committee for the opportunity to express opposition to the nomination of Judge Robert H. Bork as an Associate Justice of the Supreme Court.

The bulk of my practice consists of representing victims of antitrust violations in court, frequently on a contingency fee basis. Antitrust has experienced an evolution in my 32 years of practice. However, as I have testified in the past -- contrary to the opinions of some of my colleagues -- I think the state of antitrust is, by and large, healthy. While it is true that the Supreme Court in recent years has erected some formidable obstacles to a plaintiff's recovery, the Court has adopted a delicate and fair approach to antitrust, balancing the rights of

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[1/] The Executive Committee of the Committee to Support the Antitrust Laws voted to oppose the nomination. Two member law firms abstained on the grounds that they anticipated having cases in the Supreme Court in the near future and wished to avoid the appearance, however, incorrect, of judge shopping.

consumers, small business, and big business. The Court has been sensitive to the shift from public to private enforcement of the antitrust laws and has attempted to accommodate that transition while preserving the purpose and integrity of the antitrust laws. There is no reason to believe that any opinion of the Court in recent years has been decided in accordance with any particular ideology; nor has the Court questioned the values which the antitrust laws protect.[2] Even when it has overruled prior opinions, the Supreme Court also has acted cautiously, confining its views to the practice at hand and carefully acknowledging the role of precedent.[3] The Court has acted in its best traditions commanding respect even from those who cannot always agree.

The confirmation of Robert Bork would undermine the Court's approach. I am thoroughly familiar with Robert Bork's extensive writings in the antitrust law, most particularly The Antitrust Paradox. These writings show conclusively that, unlike the current members of the Supreme Court, he has "an axe to grind." Given free rein, he would eliminate most of the protections for consumers, small businesses, innovators and discounters embodied in the antitrust laws. The vast majority of The Antitrust Paradox is a series of attacks on the opinions of the Supreme Court, the institution to which he has been nominated to serve, and the enactments of Congress, the institution whose enactments he would be called upon to interpret. The basis of his attacks is his reliance on an unproven and false premise that the exclusive purpose of the antitrust laws is (I emphasize not should be, but is) the promotion of business efficiency. Using this incorrect premise as a foundation, Judge Bork proceeds to urge evisceration of 90% of the antitrust laws as determined since 1890. All vertical restraints - including resale price maintenance - would be legal per se. Virtually all mergers would be legal. Monopoly law as now known, would disappear. In short, Judge Bork's defined antitrust agenda is tantamount to repeal of the antitrust laws. That disaster to our economic system must be avoided and Judge Bork must be denied the opportunity to implement this dangerous anti-antitrust philosophy.

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[2] Opinions such as FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980); and National Soc'y of Professional Engineers v. United States, 435 U.S. 679 (1978), are clearly not hostile to antitrust.

[3] See Continental T. V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

The Antitrust Paradox is a formidable treatise consisting of three major parts, twenty-two chapters and an appendix on the efficiencies of price-fixing and market division. It is a comprehensive treatment of a multitude of important subjects. A line-by-line analysis is, obviously, impossible in a presentation of this length. I think that the Committee can understand at least in broad strokes just how radical and dangerous Judge Bork's views and analytical techniques are by examining briefly three specific aspects of the treatise:

1. His views on resale price maintenance and mergers;

2. His recommendations; and

3. His basic premise that corporate efficiency is the only goal of antitrust.

In 1911, in the landmark case of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[4/] the Supreme Court established that resale price maintenance was *per se* illegal under the antitrust laws. Mr. Justice Hughes recognized the clear public benefit deriving from the competition of discounters in the distribution chain: "[The supplier] having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."[5/] A recent empirical study by the staff of Senator Metzenbaum concluded that "a consumer could save 30% on clothes, 22% on electronics, and 18% on children's toys by shopping for selected items in discount stores rather than nondiscount stores."[6/]

[4/] 220 U.S. 373 (1911).

[5/] *Id.* at 409.

[6/] "Discounting the Family Budget", appended to Opening Statement of Senator Howard M. Metzenbaum, April 23, 1987.

Clearly, it is in the public interest that the antitrust laws protect discounting through vigorous application of the *per se* rule.

The Supreme Court and Congress agree. Even though the Supreme Court has changed the law to make the Rule of Reason applicable to non-price vertical restraints[7] and has created special, heightened evidentiary requirements in some vertical price-fixing cases,[8] it has carefully preserved the protection of the *per se* rule, reiterating it at least eleven times in the past seventy-six years, most recently earlier this year.[9]

Congress has taken the same view. After the Department of Justice urged the Supreme Court to weaken the per se rule,[10] Congress passed a series of appropriations limitations prohibiting the Department of Justice from expending public funds to alter it.[11] When the Antitrust Division issued its "Vertical Restraints Guidelines,"[12] Congress passed a resolution calling for their withdrawal and reaffirming its commitment to the *per se* rule of Dr. Miles.[13] As recently as August 6, 1987, this Committee overwhelmingly approved a compromise version of S. 430, 100th Congress, 1st Sess., which would codify the *per se* rule.

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[7] Continental T. V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

[8] Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

[9] 324 Liquor Corp. v. Duffy, 107 S. Ct. 720 (1987); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); Rice v. Norman Williams Co., 458 U.S. 654 (1982); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Simpson v. Union Oil Co., 377 U.S. 13 (1964); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); United States v. Line Material Co., 333 U.S. 287 (1948); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920); United States v. Colgate & Co., 250 U.S. 300 (1919).

[10] Brief for the United States as Amicus Curiae, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

Much of the congressional concern is in response to the current view of the Department of Justice that price-fixing should be considered under the Rule of Reason and should be afforded the same Rule of Reason treatment as non-price restraints after *Sylvania*.[14] I think it's fair to say, if nothing else, that Congress has repeatedly rejected this Department's view.

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[11] For FY 1984, Section 510 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1984, Pub. L. No. 98-166 (1983), contained such a limitation. Similar limitations were passed for FY 1986 and FY 1987. *See* Section 605 of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act, 1986, Pub. L. No. 99-180 (1985); Continuing Appropriations, Fiscal year 1987, Pub. L. No. 99-591 (1986).

[12] 5 Trade Reg. Rep. (CCH) ¶ 50,473 (Jan. 23, 1985).

[13] Section 605 of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act, 1986, Pub. L. No. 99-180 (1985).

[14] *See*, *e.g.*, Brief for the United States as Amicus Curiae at 19-29. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

Judge Bork's position is an order of magnitude more extreme than that of the Department of Justice. There is no question that he, like the Department of Justice, would like to overrule Dr. Miles. In his words:

> It is rarely possible to identify one decisive misstep that has controlled a whole body of law. A single paragraph in Justice Hughes's 1911 Dr. Miles opinion is such an instance, however, and the law of resale-price maintenance and vertical market division has been rendered mischievious and arbitrary to this day by the premise laid down there.[15]

He would apparently go way beyond the Department of Justice's position and that of the Sylvania court to make every vertical restraint per se lawful. He writes that "every vertical restraint should be completely lawful,"[16] and that the law "should abandon its concern with such beneficial practices" as "vertical price maintenance and market division."[17]

The rule of per se legality would, if adopted, cause tremendous repercussions throughout the American economy. Even the most powerful discounters would be at peril. Price-cutting would not be an acceptable way of market entry. Competition in the distribution chain would diminish and prices would rise.

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[15] Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself, (New York: Basic Books, Inc., 1978) at 32 (footnote omitted) (hereinafter referred to as The Antitrust Paradox).

[16] Id. at 288.

[17] Id. at 406.

Judge Bork's position on merger policy is similarly radical. The primary danger from mergers is that they will lead to concentration and eventually industrial stagnation. The results can and do have macroeconomic consequences for the entire economy. For example, in their new book, The Bigness Complex, Professors Walter Adams and James W. Brock demonstrate how consolidations in the steel industry led to concentration, which in turn led to problems in innovation.[18]

Because of the uncertainty of determining just how much concentration is harmful and because the problems of stagnation are so serious, Congress in 1950 passed the Celler-Kefauver Amendment to Section 7 of the Clayton Act.[19] And a Republican administration embarked on a vigorous program of enforcement.

Judge Bork believes that the law should "abandon its concern" with "small horizontal mergers" and "all veritcal and conglomerate mergers"; the only mergers of concern should be "[h]orizontal mergers creating very large market shares (those that leave fewer than three

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18/ Walter Adams and James W. Brock, The Bigness Complex: Industry, Labor and Government in the American Economy (New York: Random House, 1986) at 34-37, 57-59 (hereinafter referred to as The Bigness Complex).

19/ 15 U.S.C. § 18 (1950).

significant rivals in any market)."[20] Thus, it would apparently be acceptable to Judge Bork if all of the firms in the United States merged into three firms -- as long as each was a "significant rival" in each market.

The extreme nature of Judge Bork's proposals is clear from comparing them with the 1984 merger guidelines of the Reagan administration.[21] Those guidelines, it will be recalled, employ the Herfindahl-Hirscham Index (HHI) of summing the squares of individual market shares to judge concentration and the dangers produced by a proposed merger. The merger guidelines say that an HHI above 1800 shows a "highly concentrated" market and that "[a]dditional concentration resulting from mergers is a matter of significant competitive concern."[22] Under Judge Bork's view, a merger that produced three "significant rivals" in a market would produce a minimum HHI of 3333,[23] nearly twice the threshold contained in the merger guidelines. If the market shares are 50%, 30% and 20%, the HHI would be 3800, over twice the merger guidelines' most dangerous threshold.[24]

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[20] The Antitrust Paradox at 406. At another point, he states that "mergers up to 60 to 70 percent of the market should be permitted. . . ." Id. at 221.

[21] U. S. Department of Justice, Merger Guidelines - 1984, 2 Trade Reg. Rep. (CCH) ¶ 4490-95 (June 4, 1984).

[22] Id. at ¶ 4493.101.

[23] The minimum HHI is based upon equal market shares of 33.33%. The square of 33.33 is 1111. There would be three firms, so the total HHI would be 3333.

I am among those who have criticized the guidelines themselves as being too lax. In comparison with Judge Bork's views, they appear stiff indeed. Judge Bork's views on merger and concentration are a radical prescription for industrial disaster.

Judge Bork's essential recommendation[25] is that to the degree his theories are correct, the "law requires reform."[26] Judge Bork himself recognizes that his own peculiar view of antitrust cannot co-exist with current law. How much "reform" is "require[d]"?

Massive reform. Resale price maintenance (indeed, all vertical restraints) and mergers are but two prominent, easily understandable examples. According to Judge Bork, the law should have but three concerns "[t]he suppression of competition by horizontal agreement," "[h]orizontal mergers creating very large market shares," and "[d]eliberate predation."[27] He writes that

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[24] Under Judge Bork's most permissive interpretation, which would permit a single firm market share of 60-70%, see note 21, supra, the single firm HHI would be in the 3600-4900 range.

[25] Bork's recommendations are collected in Chapter 21 of The Antitrust Paradox at 405-07.

[26] Id. at 405.

[27] Id. at 405-06.

> the law should abandon its concern with such beneficial practices as small horizontal mergers, all vertical and conglomerate mergers, vertical price maintenance and market division, tying arrangements, exclusive dealing and requirements contracts, "predatory" price cutting, price "discrimination," and the like. Antitrust should have no concern with any firm size or industry structure created by internal growth or by merger more than ten years old.[28]

Judge Bork would, quite literally, discard the majority of the antitrust laws of the United States, leaving in tact only the prohibition against horizontal price-fixing and market division.

The major central premise of all of Judge Bork's theories is that the courts have failed to give sufficient deference to the concept of "business efficiency," as he defines it. He writes:

> Modern antitrust has performed this task [the task of differentiating between harmful and benficial practices] very poorly. . . . There are many problems here, but perhaps the core of the difficulty is that the courts, and particularly the Supreme Court, have failed to understand and give proper weight to the crucial concept of business efficiency.[29]

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[28] Id. at 406.

[29] The Antitrust Paradox at 7. Significantly, the debate in antitrust is not between those who favor efficiency and those who do not. There is a significant disagreement about what types of market conditions lead to efficiencies. The Bigness Complex is essentially a lengthy empirical study that concludes that the Jeffersonian ideal of dispersed power is also efficient and economically sensible.

After equating business efficiency with consumer welfare,[30] Judge Bork concludes that it is the only purpose of the antitrust laws:

> The only goal that should guide interpretation of the antitrust laws is the welfare of consumers. Departures from that standard destroy the consistency and predictability of the law; run counter to the legislative intent, as that intent is conventionally derived; and damage the integrity of the judicial process by involving the courts in grossly political choices for which neither the statutes nor any other acceptable source provide any guidance.[31]

For Judge Bork to assert that efficiency as he defines it should be the only goal of antitrust is, in my view, a mistaken proposition. To suggest that it is the only purpose is a fanciful misreading of the antitrust laws that is frightening when its source is a nominee for the Supreme Court. Although I am not an historian, I am confident that the drafters of the Sherman Act were not motivated by a feeling that the monopoly trusts were inefficient. Rather, they were concerned among other things about limiting the power of industrial behemoths and providing fair business opportunities to imaginative entrepreneurs and small businesses. Hans Thorelli, the author of definitive study of the legislative history of antitrust, has written that Congress had in mind as the "immediate beneficiaries" of the legislation

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[30] *Id*.

[31] *Id*. at 405.

> the small business proprietor or tradesman whose opportunities were to be safeguarded from the dangers emanating from those recently-evolving elements of business that seemed so strange, gigantic, ruthless and awe-inspiring.[32]

Many scholarly commentators have reviewed the same legislative history and reached the conclusion that Judge Bork is wrong.[33]

CONCLUSION

Antitrust is central both to the preservation of a competitive economic system and the preservation of our liberties. Judge Bork would eviscerate and effectively repeal the antitrust laws because of his erroneous view that they are concerned only with efficiency. Judge Bork's radical views are a serious threat to the continued viability of this important body of law. As a Suprme Court justice he could seek to implement a carefully documented ideology to overrule long established precedents and fundamentally alter our economic system. I respectfully submit that you should reject this nomination.

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[32] H. Thorelli, The Federal Antitrust Policy: Origination of an American Tradition, 227 (1955).

[33] See, e.g., Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 Hastings L. J. 67 (1982); Fox, The Modernization of Antitrust: A New Equilibrium, 66 Cornell L.Rev. 1140 (1981); Schwartz, Justice and Other Non-Economic Goals of Antitrust, 127 U. Pa. L. Rev. 1076 (1979); Pitofsky, The Political Content of Antitrust, 127 U. Pa. L. Rev. 1051 (1979); Elzinga, The Goals of Antitrust: Other Than Competition And Efficiency, What Else Counts, 125 U. Pa. L. Rev. 1191 (1977).

Senator METZENBAUM. While you are putting statements in the record, may I put in a statement from Lawrence A. Sullivan, Earl Warren Professor of Public Law at Boalt Hall School of Law, University of California at Berkeley, as well as a statement from Herman Schwartz, Professor of Constitutional Law at the American University in Washington and former chief counsel to the Senate Antitrust and Monopoly Subcommittee. I would like to put both those statements in the record.

The CHAIRMAN. Without objection.

Senator METZENBAUM. Thank you.

[The statements of Mr. Sullivan and Mr. Schwartz follow:]

September, 1987

Statement of

Lawrence A. Sullivan

Earl Warren Professor of Public Law

Boalt Hall School of Law

Berkeley, California 94720

Before the Senate Judiciary Committee,

Hearings for the Nomination of

Robert Bork for

Justice of the United States

Supreme Court

Judge Bork has strong views about what is good antitrust law and what is bad antitrust law. For example, he thinks allowing resale price maintenance would be good, forbidding it is bad; always allowing tying agreements and exclusive contracts would be good, restricting them is bad; allowing mergers so long as there remain in the industry two or three viable firms would be good, forbidding mergers before concentration reaches such an extreme is bad.

Judge Bork justifies these and like views with Chicago school economic theory. He thinks efficiency should be the only goal of antitrust law; he thinks market conduct is efficient unless it causes a reduction in output; and he thinks that vertical restraints like resale price maintenance, and mergers short of near monopoly do not reduce output.

As academic theories, these views are interesting. In the Bork book and articles they are well argued. Other antitrust analysts learned something by reacting to them. In the end, most people not committed to the Chicago ideology find them to be wrong, at least in the sense of being over-simplifications and too extreme. Nonetheless, if Judge Bork stopped at the point of saying what he thinks the law ought to be, one might not object.

But that is not where he stops. Rather his books and articles and public statements assert that Congress intended the antitrust laws to do just what Judge Bork thinks they ought to do and nothing more. That proposition presents difficulties. One problem is that there are several important Supreme Court cases that hold otherwise, cases which Judge Bork asserts are wrong and should be overruled; and presumably he would vote that way if confirmed.

If the legislative history of the antitrust laws supported the Bork view, that, too, would be a plausible position. However the legislative histories of the major antitrust statutes give little support to the Bork thesis. The sole concern of Judge Bork is efficiency, primarily allocative efficiency. The central concern of the Congress that passed the Sherman Act was not efficiency at all, and no one in that Congress had ever even heard of allocative efficiency. The dominant Congressional concern was that monopoly power was being used to gouge consumers and suppliers and to coerce weaker competitors. The Congress that passed the Clayton Act was not indifferent to vertical restraints like tying; it was convinced that they could foreclose competitors from a market; it wanted that stopped. So, too, with the merger law. The Congress that passed the Celler-Kefauver Act wanted to stop industrial concentration long before the point at which only two or three viable firms are left. It wanted to stop the concentration process in its incipiency.

Judge Bork presents himself, and his supporters present him, as an exponent of judicial restraint. That is a very respectable position. It is one with wide appeal. It was the approach, for example, of Justice Frankfurter. He was consistent. He would not manipulate legislative history or invent constitutional doctrine to frustrate the legislative majority, whatever the political complexion of that majority at a particular time. But the reading which Judge Bork gives to the legislative histories of the antitrust statutes is not the reading one would expect from a judge who is seriously seeking to determine the original intent of Congress. It is a result-oriented reading. It is a reading aimed at making the statutes do what Judge Bork, the theoretician, thinks they ought to do, and nothing more. It would be reassuring if the Bork book and articles could be dismissed as the contribution of an eager and lively young scholar to the academic debate. But they cannot be. They are the views of Bork, the mature scholar; and they were vigorously reasserted last November 15 in a public address at the Association of the Bar of the City of New York by Judge Robert Bork a potential Supreme Court nominee (See Exhibit A, attached).

Moreover, Judge Bork's judicial activism doesn't stop with a strained reading of legislative history. He has a back-up position. In that November, 1986 address he told the lawyers in attendance that his minimalist reading of the antitrust laws is the only reading that can save those laws from unconstitutionality. His claim is a startling one. He says that if Congress meant the Court to take into account considerations such as the loss of local control or other like effects of the excessive concentration of economic power -- (factors which the Supreme Court has said Congress did intend to be taken into account) -- then the Court must refuse to do so. It doesn't matter how clear the expression of Congressional intent may be. Judge Bork asserts that if Congress in a statute obliges the Court to weigh and balance several competing factors before coming to a judgment, the Court must refuse. He says that weighing and evaluating a set of factors and coming to a judgment is a legislative, not a judicial, function. For the Court to perform such a function would be a breach of the separation of powers and therefore unconstitutional. In short, Judge Bork discovers not in the language of the Constitution, but somewhere in the space between one Article and another, an implication that courts may not do the task which Congress in the antitrust laws turned over to them, and which courts have been successfully doing for decades.

Separation of powers, the doctrine that Judge Bork uses for this purpose, has less basis in the language of the Constitution than does the broad right of privacy which he disdains as invention. Not only that, he turns that doctrine on its head. The separation of powers doctrine has never implied that courts may not engage in balancing. Courts are not computers that must be precisely programmed by the legislature. They never have been and never could be. The very essence of the judicial function is to evaluate and to judge.

Nor does the result-oriented activism of Judge Bork end when he finds a reason why the antitrust laws, if read as Congress intended, would be unconstitutional. No, Judge Bork goes on and discovers a way to save them from that fate. Remarkably, it turns out that the only way to protect the antitrust laws from condemnation is for the courts to ignore every other factor Congress wanted weighed and to consider only economic efficiency (which Judge Bork calls "consumer welfare"). It is quite a conjuring trick. Constitutionality is preserved when the Court refuses to follow the original intent of Congress and, instead, construes the antitrust laws to do precisely what they would have done had they been drafted by Judge Bork.

All of this may be creative constitutional scholarship. But it is not an expression of judicial restraint. If Judge Bork were to act on the bench in the way that his November speech asserted that the Court should act, he would be engaging in the most rampant kind of judicial activism. He would not be interpreting the Constitution. He would be converting it into a Rorschach inkblot into which he could read his own policy views.

-- End --

EXHIBIT A

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Saturday, November 15, 1986

ANTICIPATING ANTITRUST CENTENNIAL

Comments by The Honorable Robert H. Bork

Milton Handler has asked that I focus on the subject of the goals of antitrust and since I am in substantial agreement with Don Turner about that I could save us all a lot of time by just agreeing and sitting down. However, on the platform with us, fortunately for purposes of dramatic affect, we have one of the foremost exponents of the view that judges may consider non-economic goals in deciding antitrust cases. I refer to Dean Pitofsky. Now it is kind of unfair of me to pick on him, it's kind of unfair of me even to identify him, in this respect. (Laughter) But he is here and I will use him as a proxy for the people I really want to argue with.

Antitrust thinking has changed a great deal in the past few years and undoubtably will change again. There is not only the possibility of new legislation but there is the certainty that economic analysis will continue to evolve and as it does the rules of antitrust will follow. But the present shift in antitrust enforcement is due at least in part to a dramatic shift in judicial perceptions of the goals of antitrust policy. It was routinely said not long ago that the goals of antitrust were not exclusively economic, that judges should bear political and social values in mind in reaching decisions. Today it is commonly said that they are, that the goals of antitrust are exclusively economic. In a sense that the only goal is the maximization of the welfare of the consumers. The question is whether this goal may properly evolve or change as economic analysis wil do in framing rules. I think not. Here I wish to make a decidedly perverse suggestion, one that will be regarded by economists and their fellow travellers as heretical. It is this. On these subjects in antitrust, law is a more rigorous and unchanging discipline than is economics. Hence it is proper that the substantive rules of the law evolve as economic understanding progresses. But it is not proper that the goal of antitrust change because under our form of government the considerations of law that determine that goal are permanent.

Now as I said, I will use Dean Pitofsky as an illustration. He begins his provocative article, The Political Content of Antitrust, by asserting [that] the issue among serious people has never been whether non-economic considerations should outweigh significant long term economies of scale but rather whether they had any role to play at all, and if so, how they--that is the political goals--should be defined and measured. I relieved to hear that that was not an issue among serious people, but that does drop Learned Hand, Earl Warren and William O'Douglas into an unfortunate category. (Laughter)

Now Dean Pitofsky specifies the political values he wants applied. First, a fear that excessive concentration of economic power will breed anti democratic political pressures. Second, a desire to enhance individual and business freedom by reducing the the range within which private discretion by a few in the economic sphere controls the welfare of all. (I am still quoting from the Dean.) Third, an overriding political concern is that if the free market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs. My objection to all of this is not primarily that the political values listed are extremely amorphous or even if they are wrong as a matter of fact, as is certainly true of the prediction that the likely result of efficiency in an economy is an economy dominated by a few corporate giants.

The Dean rests his argument essentially upon legislative intent. He says an antitrust policy that fails to take political concerns into account would be unresponsive to the will of Congress and out of touch with the rough political consensus that has supported antitrust enforcement for almost a century. Now I have time constraints, and I wont pause to argue as I have elsewhere, that the legislative history of the various antitrust statutes contains little or nothing that suggests that judges should use political considerations to make decisions. Nor will I repeat the other arguments about the text of the statutes and the structure of the law and the distinctions it makes. It seems to me that when one looks at the academic literature which purports to find the direction the courts to take the political values into account, it really ignores the arguments from text, structure, and so forth, in favor of extracting snippets of rhetoric about grand values from the legislative history. And there certainly is rhetoric about very large values in the legislative history.

But I want to go further, and urge that if all of these arguments that I have made in the past and which I skim over here did not exist and if everything said by the proponents of multiple goals of political goals of the antitrust laws, if all of that were true, it would not matter, once it is admitted that is, if Congressmen explicitly they said they wanted courts to weigh political values against the economic welfare of consumers, it would not matter. Once it is admitted that a major component of antitrust policy is the welfare of consumers, and I think almost every one admits that, it follows, I think, that consumer welfare must be the exclusive goal of the law.

And the argument here, of course, is constitutional and I am speaking about separation of powers. We all know that the separation of powers often requires courts to refuse to do things that Congress explicitly directs them to do. Separation of powers underlies the Article III standing concept, the political question doctrine, and so on. It also underlies the current debate about how judges should approach the Constitution, the current debate about original intention, the current debate about whether judges may create new rights not to be found in the textual or historical Constitution.

And indeed, I think that the common view of courts at work here. I think the view that judges should take rhetoric discussion of political consequences out of the legislative history, and proceed to weigh political concerns as they define them against economic welfare, it is really the same kind of function that is advocated when judges are urged to make up new constitutional rights out of moral philosophy or some other source. I think it is, in both cases, a function that is forbidden by the concept of separation of powers which involves what Warth against Seldin said concern about the proper and properly limited role of courts in a democratic society. Now antitrust once had a theory of this sort, but I skip over those cases because of time and we are running late, but to illustrate what I mean by the separation of powers concerns which prevent courts from taking any political or social values into account in applying the antitrust laws, let me hypothesize two very different states of legislative intent.

In the first hypothetical state of intent, Congress clearly indicates in the debates that the courts are to protect consumers, they are also to protect small business and they are also to protect political democracy. In cases of conflicts between those values the courts are to assess the relative importance of the values and to arrive at decisions that achieve the best balance. You will recognize that as what is the "in effect" direction that many commentators think that Congress gave the courts.

In my second hypothetical state of intention, Congress clearly indicates that imports are hurting American business, they're restraining trade, damaging small business, and that courts are to entertain suits by American firms against importers, to decide which American industries require protection, and impose tariffs that balance the conflicting interest involved including the interests of consumers.

I think there is no doubt that no court would accept that second delegation to think about, to balance consumer welfare, industry welfare and so forth and write tariffs. That would impose a non-judicial task forbidden by the separation of powers, the very kind of delegation courts have refused many times in the past.

But returning to the first hypothetical in which the court had to balance political values against economic values, is there really any doubt that that imposes precisely the same kind of non-judicial duty? I think the only difference is it is legislation. What it imposes is wide open legislation by courts about economics and about politics, just like a tariff law. I think the only difference is that many commentators claim that one is the actual intention of the Sherman Act and the courts are bound to carry it out. If courts reject one, I think they are bound to reject the other. And that leaves us, I think, for constitutional reasons as well as for all others, with an exclusive goal of consumer welfare in the antitrust laws.

Thank you. (Applause.)

STATEMENT OF HERMAN SCHWARTZ
BEFORE THE SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF JUDGE ROBERT H. BORK
TO BE
ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

September 29, 1987.

My name is Herman Schwartz and I am a professor of law at the American University in Washington, D.C... I teach Constitutional Law and have taught antitrust law; I am a former Chief Counsel and Staff Director of the Subcommittee on Antitrust and Monopoly of this Committee.

Dean Pitofsky and Professor Sullivan have laid out the scope and consequences of Judge Robert Bork's substantive views on antitrust within the individual context. You have also heard about what can only be described as Judge Bork's minimal high regard for congressional abilities and activities in economic matters. As an aside, one cannot help wondering about Judge Bork's judgment in these matters since this is also the body that put through a most complicated and elaborate tax reform bill as well as other complex and successful legislation such as the Securities Acts and many other economic enactments which have met with a great deal of approval and success.

Judge Bork is a very imaginative lawyer though. He puts down legal theorists but he is no mean theorist himself. Because he has also worked in constitutional law, he has gone beyond antitrust to incorporate his antitrust views in constitutional doctrine. As a result, even if Congress explicitly wanted to do the things he says it shouldn't, according to Judge Bork, the Constitution forbids it. Thus, Judge Bork, here as in other contexts to which I will advert below, uses constitutional doctrines--in contravention of the normal maxim of judicial restraint that constitutional arguments should be rarely invoked--to disenable Congress from trying to achieve what it has concededly and explicitly has been trying to do.

This was, of course, most graphically demonstrated in the November 1986 speech which he made less than a year ago at a Symposium in New York on the coming centennial of the antitrust laws. As Dean Pitofsky has pointed out, Judge Bork went beyond his normal criticism on economic and historical grounds of Congressional efforts to import what he calls "political values" into the antitrust laws, and argued that even if Congress had made these choices explicit "it would not matter." Dean Pitofsky has quoted the relevant passage but it may be worth quoting somewhat more of it to indicate the breadth of the constitutional claims.

Judge Bork said:

> But I want to go further, and urge that if all of these arguments that I have made in the past and which I skim over here did not exist and if everything said by the proponents of multiple goals of political goals of the antitrust laws, if all of that were true, it would not matter, once it is admitted that is, if Congressmen explicitly they said they wanted courts to weigh political values against the economic welfare of consumers, it would not matter. Once it is admitted that a major component of antitrust policy is the welfare of consumers, and I think almost every one admits that, it follows, I think, that consumer welfare must be the exclusive goal of the law.
>
> And the argument here, of course, is constitutional and I am speaking about separation of powers. We all know that the separation of powers often requires courts to refuse to do things that Congress explicitly directs them to do. Separation of powers underlies the Article III standing concept, the political question doctrine, and so on. It also underlies the current debate about how judges should approach the Constitution, the current debate about original intention, the current debate about whether judges may create new rights not to be found in the textual or historical Constitution.

This 1986 position represents a hardening of Judge Bork's views since in 1978 he wrote only that his approach was the only one which "permits courts to behave responsibly and to achieve the virtues appropriate to law." The Antitrust Paradox 89 Now he apparently argues that his approach is the only one which "permits courts to behave constitutionally." The impacts of the two approaches are of course, very different indeed, with respect to what Congress is permitted to try to do.

There is no precedent, no logic, and no sense to Judge Bork's position. There are almost no cases that I have been able to find, in which the federal courts have refused to apply a federal statute empowering the courts to do certain things, but the courts refused for the reasons given by Judge Bork. Whether it be standing, political questions, or in any way related to the "current debate about original intention, the current debate about whether judges may create new rights not to be found in the textual or historical Constitution," I know of no case where the

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* My version of his talk is based on a copy of a tape that the Nation Institute obtained from the office of Milton Handler, in whose name the lecture at which Judge Bork spoke was given. I then had the tape transcribed by my secretary. Consequently my transcription is a virtually verbatim transcript of what Judge Bork said, and I have attached a copy of that to my testimony.

courts have refused because the subject of the assignment somehow involved "nonjudicial" issues or goals.

First, let us set forth exactly what these "political goals", "political values" that the courts may not enforce. First Judge Bork draws on Dean Pitofsky's important article in the University of Pennsylvania Law Review a few years ago in which the Dean sets out as goals, Congress' concern about "excessive concentration," and its desire to increase economic and individual freedom by avoiding concentration of economic power, Judge Bork elaborates on these goals in The Antitrust Paradox, where he also challenges such "political and social" goals as avoiding dealer "bondage," and "business egalitarianism," though he admits they have been very prominent in antitrust decisions. In that book he also challenges concern by Justice Peckham (whom he otherwise quotes approvingly) for "small dealers and worthy men." He aims special fire at Judge Learned Hand's reading of the legislative history in the Alcoa case United States v. Aluminum Co. of America, 148 f.2d 416 (2d Cir. 1945) (a reading shared in by all but a few scholars), that "among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them," as well as Judge Hand's belief that "Congress wanted to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry into small units which can effectively compete with each other." (Paradox 52) (This is probably the first time that anyone has ever called Judge Hand, one of the leading proponents of judicial restraint, a judicial activist who "created an inexhaustible reservoir who created . . . a warrant to do good as the judge sees the good, with no more guidance than that public injury is to be weighed against private benefit on scales that are not described, or rather are described as the judge's 'preference.'" (Paradox 53))*

Judge Bork also challenges the "incipiency" doctrine, which grew out of Congress' effort to nip anticompetitive trends before they got out of hand, particularly with respect to those practices subject to the 1914 and 1950 provisions Clayton Act, such as mergers, tie-ins, exclusive dealing, etc., all of which, of course, are considered almost per se legal by Judge Bork.

These then are the social and political goals which he considers illicit, and which in his latest nonjudicial statement on antitrust, he rendered irrelevant by making an effort to achieve them unconstitutional.

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* Incidentally, economists are now agreed that Judge Hand's Alcoa decision "increased the rate of invention" in the aluminum industry, Peck, Competitiveness in the Aluminum Industry 210 (1961), and expanded production. S. Whitney, 2 Antitrust Policies 118 (1958).

Judge Bork's view has no basis in precedent, history, logic, or current practice. It represents judicial activism in the extreme and is a constitutional version of the same kind of activism that Judge Bork shows in his substantive antitrust analysis, which Dean Pitofsky has demonstrated. It is indeed ironic that in the name of separation of powers and judicial restraint, which for Judge Bork and others usually implies that the courts are to adhere to *majoritarian* views, Judge Bork strikes at majoritarianism, a majoritarianism reflected in an almost uniform hundred-year history of numerous precedents and past and congressional enactments.

What then of the constitutional theory? In a version of the paper that I did not have, I understand that Judge Bork cites *Hayburn's Case*, as support. 2 U.S.(2 Dall.) 408 (1792) But *Hayburn's Case* has nothing to do with this matter. In *Hayburn's Case*, Congress assigned to the courts the role of approving veterans pensions *subject to approval by the Secretary of War*. The Court never dealt with this as a full court but various justices, sitting on circuit, all agreed that one could not assign to the courts duties of this kind "inasmuch as it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the Secretary at [sic] War, and then to the revision of the legislature; whereas by the Constitution, *neither the Secretary at War, nor any other executive officer nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court*."

In other words, as the editors of the leading casebook on federal courts classified *Hayburn's Case*, this is a case dealing with "the requirement of finality," not an assertion that the particular task itself was unjudicial. See also *Gordon v. United State*, 117 U.S. 697 (1864) Indeed in 1926, in *Tutun v. United States*, 270 U.S. 568, Mr. Justice Brandeis held that the federal court could be given "jurisdiction to naturalize aliens as citizens of the United States," pointing out that "the function of admitting to citizenship has been conferred exclusively upon courts continuously since the foundation of our government," citing a 1790 Act. He distinguished *Hayburn's Case* from this matter and obviously it was because there was no finality in that case, whereas here there was.

The federal court has also been given other functions which have been sustained against challenges of non-judiciability such as the power to make civil and criminal rules for the federal courts, which rules often reach some very substantive issues such as the Rule 23, class action rules, the conflict of interest rules for criminal cases, and some of the discovery rules affecting personal liberty, such as Rule 35.

The point in citing these cases is not to argue that these are all like the task assigned the courts in enforcing the antitrust laws and enforcing the goals that Judge Bork calls political, for the latter matter is much easier to justify. It is simply to point out that the lines between what Judge Hand called the "departments of government" are not sharp and hermetic and do not act as Chinese walls preventing one branch from performing functions which usually are formed by others.

Also, I have found only one case in which a court has refused to accept Congress' grant of standing, and that was when Congress granted Senator McClure standing to challenge Judge Mikva's appointment to the Court of Appeals for the District of Columbia Circuit. McClure v. Carter, 513 F.Supp. 265 (D.Idaho 1981) (three-judge). In that case, however, it was clear from long-established precedent that Senator McClure had absolutely no right to such standing, for it has long been a rule that one cannot challenge a judicial appointment. The doctrine of congressional standing, which Senator McClure tried to use, could not be invoked here because he could not plausibly claim that his functioning as a Senator had been impaired by the confirmation of Judge Mikva--as the Court of Appeals said, Senator McClure was simply trying to change a result Congress had already settled on. This does not qualify for Congressional standing.

Nor have I found any case where the Supreme Court or other federal courts have refused to entertain an issue that Congress had delegated to it on the ground that raised a non-justifiable political question. This would be very strange indeed, since the essence of a political question is that it raises matters that are either not manageable by the judiciary or would entail a certain disrespect for other branches. If Congress passes a law which the executive signs, it is difficult to see why it would be disrespectful to Congress or the executive. And as to manageability, I know of no case where a court has said an issue assigned to it by Congress was not judicially manageable, especially an issue raised in many statutes and one with which courts have been dealing for almost 100 years. Indeed, even where, as with extinguishing Indian titles, the Court had considered a matter a "political question [which] presents a non-justiciable issue" because it involved two sovereigns, it became justiciable when Congress "directed otherwise" in 1935 by seeking . . . judicial disposition." United States v. Alcea Band of Tillamooks, 329 U.S. 40, 46 (1946); cf White v. Mechanics' Securities Corp., 269 U.S. 283, 286, 301 (1925).

Finally, to stretch the current arguments about new rights and original intent to this issue strikes me as far-fetched. The issue as to new rights has to do primarily with what can be drawn from the Constitution, apart from its text. The issue that Judge Bork is raising in the antitrust context involves, by Judge Bork's hypothesis, a very clear and deliberately chosen text. The sole similarity is giving the court responsibilities it should not have, but there is obviously a vast difference between the courts being given such responsibility by Congress, and the courts taking it on their own. The controversy over "new rights" involves only the latter and not the former. And as to original intent, again under Judge Bork's hypothesis, there is no question about Congressional intent.

For all of these reasons it is difficult to see how any plausible constitutional argument can be made that Congress can not assign to the courts the role of taking these goals and values into account.

Moreover, Congress has opted for such goals in many other statutes in the economic sphere. For example:

The Staggers Act of 1980, 49 U.S.C. ' 10101A, in setting out rail transportation policy includes as item 13

> "to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination."

Section 10 of the Public Utility Holding Co. Act of 1935, 15 U.S.C.A. ' 791 J(b), provides that the commission shall approve acquisitions unless the commission finds that the

1. "acquisition will tend towards . . . the concentration or control of public utilities companies of a kind or to an extent detrimental to the public interest or interest of investors or consumers."

Section 11 of the Act allows a registered holding company to continue to control integrated public utility system if

> "the continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation." (emphasis added)

The Patent Laws also provide for such values. For example, 35 U.S.C.A. 209(c)(2) says that a federal agency may not grant an exclusive or partially exclusive license under certain circumstances "if it determines that the grant of such license will tend substantially to lessen competition or result in undue concentration in any section of the country," and then goes on to say that "first preference in the exclusive or partially exclusive licensing of federally owned inventions shall go to small business firms . . . " (emphasis added)

Finally, the Small Business Economic Policy Act of 1980 sets forth these purposes:

> For the purpose of preserving and promoting a competitive free enterprise economic system, Congress hereby declares that it is the continuing policy and responsibility of the Federal Government to use all practice means and to take such actions as are necessary, consistent with its need and obligations and other essential considerations of national policy, to implement and coordinate all Federal department, agency, and instrumentality policies, programs, and activities in order to: foster the economic interests of small businesses; insure a competitive economic climate conducive to the development, growth and expansion of small businesses; . . . reduce the concentration of economic resources and expand competition; and provide an opportunity for entreprenuership, inventiveness, and the creation and growth of small businesses.

Further research, I am sure could produce many more instances.*

The consequences of Judge Bork's view, therefore, are that many statutes seeking to direct the economic life of the country and to fulfill certain political and social goals are unconstitutional and outside of Congressional power. No matter how much Congress wants to avoid small business "bondage", for example, it may not do so if it wants the courts to administer it. This, of course, would seem also to affect such statutes as the Automobile Dealers Franchise Act, 15 U.S.C. 1221, and the Petroleum Marketing Practices Act of 1978, 15 U.S.C.A 2801, both of which are explicitly designed "to balance the power now heavily weighted in favor of the automobile manufacturers" and oil companies, in order to remedy "the disparity of bargaining power between franchisor and franchisee," one of the major problems arising out of the "bondage" that Judge Bork considers an inappropriate "social value."

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* These, of course, are almost all in the regulatory context, but in all these cases it is well established that the courts are given the task of reviewing the agencies' judgment to determine whether the values and purposes that Congress put into the statutes and which, by hypothesis Judge Bork has acknowledged to be in the antitrust statute for purposes of his constitutional argument, are adequately considered and given due weight. NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944); Packard Motor Co. v. NLRB, 330 U.S. 485 (1947) These are ultimately judicial questions and all, of course, come up in the adjudicatory context, subject to extensive judicial review by the courts.

Judge Bork seeks to assimilate this kind of judicial responsibility to setting tariffs. If tariff-setting were assigned to the courts, it would probably be dismissed as a "political question", since it involves many complicated considerations not appropriate for judicial management--which, of course, is why it would never be assigned in the first place. This, of course, is quite different from antitrust law tasks where considerations like concentration, market power, and concern for small business have long been the business of the courts.

It is especially startling that Judge Bork should suddenly find unconstitutional a practice which he concedes the courts have been performing--inappropriately in his view, but nevertheless consistently--for some seventy-five years, at least since the case, Dr. Miles Medical Co. v. John D. Park and Sons, Inc., 220 U.S. 373 (1911). Even in Judge Bork's own statement of his constitutional cosmology, one should not lightly overturn long-standing doctrines around which a great many institutions and practices have developed. And this is certainly true where what is involved is not just one statute but many others.

Judge Bork's resort to the Constitution is not unusual. Despite his claims of being hostile to judicial activism, he has no hesitation in constitutionalizing his restrictive standing notions, arguing, for example, in a dissent that the Constitution prohibits granting standing to Congressmen (or any other government officers) if they want to challenge a direct interference with their prerogatives as Congressmen. Barnes v. Kline, 759 F.2d 21 (D.C.. Cir. 1985), dismissed as moot, 107 S.Ct. 734 (1987). He has also tried to create new doctrine restricting associational standing, leading his sympathetic colleague, Judge James Buckley, to protest that this was based on nothing but inferences from Supreme Court decisions, had no precedential support, and was unnecessary to the decision of the case. Haitian Refugee Center v. Gracey, 809 F.2d 794 (D.C... Cir. 1987) This activism is also reflected in his view that the campaign contributions law or indeed any law seeking to control campaign contributions is not just bad policy but unconstitutional, and thus, Congress is constitutionally disempowered to deal with what every one agrees to be serious problem. I have dealt with this in an article in The Nation, which I also append.

Perhaps I have misunderstood Judge Bork's views. I hope not, because I would not like to do him any injustice. The Committee has both the tape and the transcript with which to compare my assessment of his views with his own. Unfortunately, he has done very little systematic elaboration of his thoughts on these matters--indeed his last systematic analysis of constitutional problems was in his 1979 Michigan speech and before then in his 1971 Indiana article. Consequently it is hard to respond to the specifics of his position, because he offers so very few. But if I have characterized Judge Bork's views correctly, then as I said earlier, they are without any constitutional, historical, or precedential support and are simply another expression of his attempt to enforce his views--which he concedes to be those of a mere handful of economists and academic lawyers (Paradox 425)--in direct contravention of congressional will.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Saturday, November 15, 1986

ANTICIPATING ANTITRUST'S CENTENNIAL

Comments by The Honorable Robert H. Bork

Milton Handler has asked that I focus on the subject of the goals of antitrust and since I am in substantial agreement with Don Turner about that I could save us all a lot of time by just agreeing and sitting down. However, on the platform with us, fortunately for purposes of dramatic affect, we have one of the foremost exponents of the view that judges may consider non-economic goals in deciding antitrust cases. I refer to Dean Pitofsky. Now it is kind of unfair of me to pick on him, it's kind of unfair of me even to identify him, in this respect. (Laughter) But he is here and I will use him as a proxy for the people I really want to argue with.

Antitrust thinking has changed a great deal in the past few years and undoubtably will change again. There is not only the possibility of new legislation but there is the certainty that economic analysis will continue to evolve and as it does the rules of antitrust will follow. But the present shift in antitrust enforcement is due at least in part to a dramatic shift in judicial perceptions of the goals of antitrust policy. It was routinely said not long ago that the goals of antitrust were not exclusively economic, that judges should bear political and social values in mind in reaching decisions. Today it is commonly said that they are, that the goals of antitrust are exclusively economic. In a sense that the only goal is the maximization of the welfare of the consumers. The question is whether this goal may properly evolve or change as economic analysis wil do in framing rules. I think not. Here I wish to make a decidedly perverse suggestion, one that will be regarded by economists and their fellow travellers as heretical. It is this. On these subjects in antitrust, law is a more rigorous and unchanging discipline than is economics. Hence it is proper that the substantive rules of the law evolve as economic understanding progresses. But it is not proper that the goal of antitrust change because under our form of government the considerations of law that determine that goal are permanent.

Now as I said, I will use Dean Pitofsky as an illustration. He begins his provocative article, The Political Content of Antitrust, by asserting [that] the issue among serious people has never been whether non-economic considerations should outweigh significant long term economies of scale but rather whether they had any role to play at all, and if so, how they--that is the political goals--should be defined and measured. I relieved to hear that that was not an issue among serious people, but that does drop Learned Hand, Earl Warren and William O'Douglas into an unfortunate category. (Laughter)

Now Dean Pitofsky specifies the political values he wants applied. First, a fear that excessive concentration of economic power will breed anti democratic political pressures. Second, a desire to enhance individual and business freedom by reducing the the range within which private discretion by a few in the economic sphere controls the welfare of all. (I am still quoting from the Dean.) Third, an overriding political concern is that if the free market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs. My objection to all of this is not primarily that the political values listed are extremely amorphous or even if they are wrong as a matter of fact, as is certainly true of the prediction that the likely result of efficiency in an economy is an economy dominated by a few corporate giants.

The Dean rests his argument essentially upon legislative intent. He says an antitrust policy that fails to take political concerns into account would be unresponsive to the will of Congress and out of touch with the rough political consensus that has supported antitrust enforcement for almost a century. Now I have time constraints, and I wont pause to argue as I have elsewhere, that the legislative history of the various antitrust statutes contains little or nothing that suggests that judges should use political considerations to make decisions. Nor will I repeat the other arguments about the text of the statutes and the structure of the law and the distinctions it makes. It seems to me that when one looks at the academic literature which purports to find the direction the courts to take the political values into account, it really ignores the arguments from text, structure, and so forth, in favor of extracting snippets of rhetoric about grand values from the legislative history. And there certainly is rhetoric about very large values in the legislative history.

But I want to go further, and urge that if all of these arguments that I have made in the past and which I skim over here did not exist and if everything said by the proponents of multiple goals of political goals of the antitrust laws, if all of that were true, it would not matter, once it is admitted that is, if Congressmen explicitly they said they wanted courts to weigh political values against the economic welfare of consumers, it would not matter. Once it is admitted that a major component of antitrust policy is the welfare of consumers, and I think almost every one admits that, it follows, I think, that consumer welfare must be the exclusive goal of the law.

And the argument here, of course, is constitutional and I am speaking about separation of powers. We all know that the separation of powers often requires courts to refuse to do things that Congress explicitly directs them to do. Separation of powers underlies the Article III standing concept, the political question doctrine, and so on. It also underlies the current debate about how judges should approach the Constitution, the current debate about original intention, the current debate about whether judges may create new rights not to be found in the textual or historical Constitution.

And indeed, I think that the common view of courts at work here. I think the view that judges should take rhetoric discussion of political consequences out of the legislative history, and proceed to weigh political concerns as they define them against economic welfare, it is really the same kind of function that is advocated when judges are urged to make up new constitutional rights out of moral philosophy or some other source. I think it is, in both cases, a function that is forbidden by the concept of separation of powers which involves what Warth against Seldin said concern about the proper and properly limited role of courts in a democratic society. Now antitrust once had a theory of this sort, but I skip over those cases because of time and we are running late, but to illustrate what I mean by the separation of powers concerns which prevent courts from taking any political or social values into account in applying the antitrust laws, let me hypothesize two very different states of legislative intent.

In the first hypothetical state of intent, Congress clearly indicates in the debates that the courts are to protect consumers, they are also to protect small business and they are also to protect political democracy. In cases of conflicts between those values the courts are to assess the relative importance of the values and to arrive at decisions that achieve the best balance. You will recognize that as what is the "in effect" direction that many commentators think that Congress gave the courts.

In my second hypothetical state of intention, Congress clearly indicates that imports are hurting American business, they're restraining trade, damaging small business, and that courts are to entertain suits by American firms against importers, to decide which American industries require protection, and impose tariffs that balance the conflicting interest involved including the interests of consumers.

I think there is no doubt that no court would accept that second delegation to think about, to balance consumer welfare, industry welfare and so forth and write tariffs. That would impose a non-judicial task forbidden by the separation of powers, the very kind of delegation courts have refused many times in the past.

But returning to the first hypothetical in which the court had to balance political values against economic values, is there really any doubt that that imposes precisely the same kind of non-judicial duty? I think the only difference is it is legislation. What it imposes is wide open legislation by courts about economics and about politics, just like a tariff law. I think the only difference is that many commentators claim that one is the actual intention of the Sherman Act and the courts are bound to carry it out. If courts reject one, I think they are bound to reject the other. And that leaves us, I think, for constitutional reasons as well as for all others, with an exclusive goal of consumer welfare in the antitrust laws.

Thank you. (Applause.)

September 19, 1987 The Nation.

VOILÀ! THE CENTRIST

THE FRANTIC REFLAGGING OF BORK

HERMAN SCHWARTZ

The campaign to put Judge Robert Bork on the Supreme Court is built on a Big Lie: that Bork is a moderate, flexible centrist like retired Justice Lewis Powell Jr., whom he was nominated to replace. The White House, Washington corporate lawyer Lloyd Cutler and Bork himself have all worked industriously to cover up what Bork really is—a rigid far-right activist who is not at all hesitant about using whatever power he has to further his ideology.

A few weeks after President Reagan nominated Bork, Cutler rushed to print with a piece on the *New York Times* Op-Ed page. Writing as "a liberal Democrat and as an advocate of civil rights before the Supreme Court," Cutler placed Bork in the tradition of Justices Oliver Wendell Holmes, Louis Brandeis, Felix Frankfurter, Potter Stewart and Powell, asserting he would be "closer to the middle than to the right" of the Supreme Court spectrum. No matter that Bork disagrees with all those Justices on the central issues before the Court, that Bork has scathingly criticized Holmes and Brandeis for granting too much latitude to free expression, has ridiculed Brandeis's antitrust theories, deplored Powell's affirmative-action ruling in the *Regents of the University of California v. Bakke* case (and, by implication, his other decisions in that area), disagrees with Frankfurter's church-and-state views and has branded as illegitimate the rulings upholding abortion laws that Stewart and Powell have several times reaffirmed. For Cutler, Bork is "not far from the Justice whose chair he has been nominated to fill."

Eleven days later, the White House issued a

(*Continued on Page 267*)

the academy. This subterranean discontent might surface, reconnecting with public life. Conservatives, suspecting and fearing this, continually rail against what they imagine is the threat from the universities. Even if they are wrong, perhaps they are right. ☐

Bork

(Continued From Front Cover)

thick briefing book that painted Bork as a "powerful ally of First Amendment values" and other civil liberties and rights, whose views were in the "mainstream." Statistics were compiled to show that he had dissented in only 6 percent of the cases that came before him. No mention was made of the fact that there is dissent in the Courts of Appeals decisions less than 4 percent of the time.

Bork himself has given interviews to a series of newspapers in which, while disclaiming any intention to discuss "issues," he made sure to get across the point that he was a "moderate centrist." His statements in an interview with *USA Today* were typical:

> USA TODAY: Haven't you said you don't think of yourself as a conservative?
>
> BORK: Not as a matter of legal point of view. The position I have taken in public—that you can find in my writing—is that the judge's task is to take the intentions of the legislatures and apply to the circumstances. It's a view that has been taken by liberals and a view that's been taken by conservatives—and it's a view that's been denied by both.
>
> . . .
>
> USA TODAY: Some people say that your being on the Supreme Court could flip a lot of precedents. And you'd say, don't necessarily bet on it.
>
> BORK: Right.

Bork's writings have revealed a rigid reactionary, and part of the strategy to make him look like a moderate entails distinguishing between what he has said as a law professor and what he would do as a Justice. Thus, he told *USA Today*, "I think it's possible as an academic to toss out ideas with some freedom. But when you're a judge, what you're doing is important to people. You don't feel the same kind of intellectual freedom that you might as an academic."

Bruce Fein of the Heritage Foundation, a former associate deputy U.S. Attorney in the Reagan Administration and a spokesman for the right, was more candid. In an interview broadcast by the Voice of America, Fein disagreed sharply with Cutler:

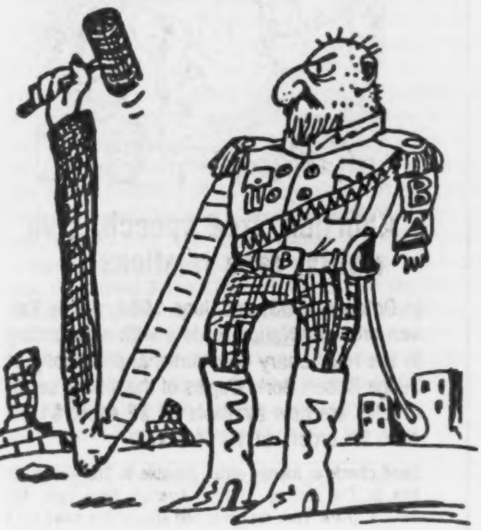
> The Bork nomination would mean, by and large, the entire docket of the Court would turn a conservative hue, rather than just half, as it's been over the last decade. By and large, Presidents get what they want. I think Judge Bork would vote the way President Reagan would anticipate.

And Cutler's own credibility in this matter is somewhat suspect. As evidence of Bork's liberalism, he cited and quoted from Bork's opinion in *Ollman v. Evans and Novak*, in which Bork came out for expanding press freedom from libel suits when criticizing political figures. Last year, however, Cutler also testified that Antonin Scalia was a centrist. As evidence of Scalia's liberalism, he cited the same *Ollman* decision. The catch is that Scalia and Bork were on opposite sides in the *Ollman* case and had sharply disagreed.

Presidents have often tried to shape the Court in their image and, as Fein says, "usually successfully." Franklin D. Roosevelt transformed the Court with his appointments and Richard Nixon achieved what he intended. But both those Presidents' goals were limited. Roosevelt only wanted to halt the Court's interference with governmental efforts to direct the economy. Nixon's main goal was to overturn the Warren Court's criminal justice rulings.

Reagan's agenda is much broader than either Roosevelt's or Nixon's. He is trying virtually to end the Supreme Court's role in advancing individual rights. The Administration has not only attacked the Court's rulings on affirmative action, separation of church and state, abortion, equal protection and criminal justice; it has also challenged the legitimacy of the Court's entering these areas at all. Attorney General Edwin Meese 3d's verbal assaults on the incorporation doctrine (which requires state and local officials to adhere to the Bill of Rights); his rejection of the Supreme Court's traditional role as the ultimate expositor of the Constitution; and his criticism of decisions that depart from what he considers to be the "original intent" of the Constitution's framers are expressions of that attitude.

Bork's record, on and off the bench, is tailor-made for the Reagan Administration's agenda. Like Meese, he has



Herman Schwartz, a contributing editor of The Nation, *is a professor of law at American University and editor of* The Burger Years: Rights and Wrongs in the Supreme Court 1969-86 *(Elisabeth Sifton Books/Viking).*

assailed not only the specific rulings but their legitimacy. And his record on the bench shows that despite constant reiteration of his fidelity to "judicial restraint," he is aggressively activist in furthering his views, regardless of judicial precedent and even the clear will of Congress.

Bork's hostility to the Court's decisions on abortion, affirmative action and school prayer is well known, and on page 269 Jamie Kalven considers Bork's views on free speech. Less known are Bork's views on access to the courts, antitrust and discrimination; the White House and Cutler did not mention the first two and omitted much about the third.

A legacy of the Warren Court is the availability of a Federal forum for people injured by government or private misconduct. Since his first days on the bench, Bork has gone out of his way to undo that legacy. A study released by the A.F.L.-C.I.O. found that in seventeen out of seventeen nonunanimous cases raising access issues he used a variety of procedural techniques to deny a litigant his day in court. Lack of standing to sue and governmental immunity have been his favorite grounds. Even when a majority of judges have voted to throw out a case on the substance of the claim, Bork has written a separate opinion challenging the court's authority to hear the case.

JUSTICE BORK?

Abortion, free speech, civil rights, race relations . . .

In October 1983, and June 1984, Jamie Kalven provided Nation readers with a grounding in the reactionary constitutional philosophy of Judge Robert Bork. Copies of this timely set of articles are now available for $2 each; $1.50 each for orders of 10 or more.

Send check or money order, payable to The Nation, to Box D, The Nation, 72 Fifth Avenue, New York, NY 10011. (New York residents add appropriate sales tax.)

Thus, Bork has held that the homeless have no right t challenge a decision by the Administration not to establish "model shelter" as promised; that Medicare patients ma not challenge an effort of the Department of Health an Human Services to prevent the courts from reviewin denials of claims; that Haitian refugees may not challenge government policy of stopping refugees on the high seas and that Congressmen may not challenge the President's us of the pocket veto.

Bork's pocket-veto opinion—a dissent—reflects his ju dicial activism and his deference to presidential power, th most publicized example of which was his firing of Archi bald Cox as Watergate special prosecutor. Congressme have been filing challenges to the pocket veto in the Distric of Columbia for more than ten years, and in an unbroke line of decisions the courts have agreed to hear them. Bor concedes this but, together with Scalia, has made it clea that he is quite ready to overturn those precedents (an at titude Scalia displayed in his first year on the Court, votin to overturn or "re-examine" no fewer than four leadin cases, one thirty-seven years old).

Bork's activism on this issue is reflected as much in hi method as in his results. One of the cardinal principles o judicial restraint is that, whenever possible, the case shoul be decided on nonconstitutional grounds. Bork has none theless relied on the Constitution in almost all his standing to-sue decisions, despite the availability of nonconstitutiona alternatives, so that if his views prevail, even if Congres wanted to grant some people the right to sue, it could no

Bork's antitrust jurisprudence, both on and off th bench, is also a good indicator of his ideology and the zea with which he pursues it. Bork is particularly noted for a article attacking a seventy-six-year-old Supreme Court deci sion that the Sherman Antitrust Act prohibits a manu facturer or wholesaler from telling a customer what t charge the next buyer. This practice, which Congress ha allowed the states to exempt from the antitrust law if the chose, added millions to retail prices until Congress repeale the exemption in 1975. Bork has not changed his mind o this issue, and once on the Supreme Court, he would almos certainly seek to overturn the 1911 decision.

Bork would also eliminate most restrictions on "hori zontal" mergers between competitors and all limitations o "vertical" mergers, those between a firm that supplies commodity and one that uses it. In 1950, in the wake of huge acquisition by U.S. Steel, Congress passed the Celle Kefauver Act, which imposed tight controls on such com binations. Fears of economic concentration and harm t small businesses were widely recognized as Congress' chi concerns, as they have been since the Sherman act w passed in 1890.

But what Congress wants means little to Bork. In a tor tured reading of the legislative history of antitrust laws, Bork concluded that the evidence showing what Congre wanted to accomplish was "inconclusive." But, he said in speech in November 1986, even if it were clear that Congre indeed had been motivated primarily by the fear of econom ic concentration and concern for small business, th "would not matter," because the Constitution does not allow Congress to tell the courts to enforce such values. No precedents or authorities are given for this novel view, which flies in the face of a series of decisions stretching back to when the Sherman act was adopted. Once again, Bork, the advocate of judicial restraint, has created a constitutional argument, so that even if Congress explicitly told the courts to be concerned about economic concentration, they and Judge Bork could ignore it.

The District of Columbia circuit gets few significant antitrust cases, but in the one that Bork got his hands on, *Rothery Storage and Van Company v. Atlas Van Lines, Inc.*, he went far beyond what was required in the case, writing his own views into the law. On the Supreme Court, Bork's impact on antitrust matters could be immense. Few other Justices seem very interested in the field, and he would have little trouble finding allies among his fellow conservative Justices for his anti-antitrust crusade.

Bork's views in this area are part of a generally probusiness ideology. A study by Columbia Law School students of rulings by Reagan appointees to the Courts of Appeals in nonunanimous cases found that in eight cases where business and industry groups sued Federal agencies, Bork voted for the business groups seven times, whereas public interest groups that sued the agencies won in only one out of eighteen on which he sat. In one notorious case, Bork stood a forty-year-old utility law doctrine on its head in order to help a power company compel its customers to pay for a canceled $400 million (with interest) nuclear plant. He has upheld a Food and Drug Administration rule extending the time color additives of questionable safety could stay on the market pending tests, and in cases involving air pollution, worker safety and labor-management relations he has ignored his usual deference to administrative agencies to overturn rulings that went against business.

Bork's views on laws barring racial and sexual discrimination also show his authoritarian side. In a 1971 law journal, he wrote that "most of substantive [i.e., non-procedural] equal protection is . . . improper. . . . The Supreme Court has no principled way of saying which non-racial inequalities are impermissible." Precedents, some set forty years ago, were challenged as "improper," including decisions protecting illegitimate children and welfare recipients; rulings prohibiting judicial enforcement of racially restrictive housing covenants, sterilization of selected groups of felons, and poll taxes, as well as the case mandating the one person, one vote principle. Although he has since tried to back away from those views by calling them "academic," he has also said that they represented the culmination of seven years' hard thinking and debate with his mentor, the late Yale Law School Professor Alexander Bickel. And this year he reiterated that "I do think the equal protection clause probably should be kept to things like race and ethnicity."

Bork might not try to put those precise views into effect, but they are based on a profound predisposition toward judicial immobility where the protection of individual rights is concerned, and a methodology he has never repudiated—that the only valid sources of constitutional law are the text, history and structure of the Constitution. Those predispositions will inevitably emerge in his decision-making on new issues that come before him.

Moral Majority leader Jerry Falwell has declared that "We are standing at the edge of history. Our efforts have always stalled at the door of the U.S. Supreme Court and [the Bork nomination] may be our last chance to influence this most important body." He's right, and not because Bork is a centrist. □

Bork v. The First

JAMIE KALVEN

Supporters of Supreme Court nominee Robert Bork are making a concerted effort to portray him as an open-minded moderate. Toward that end, they make much of his views on the First Amendment. His work in this area, they say, shows that he is more sensitive to civil liberties and less ideologically rigid than his critics suggest. They acknowledge that he advanced an extremely narrow interpretation of the First Amendment in a 1971 article in the *Indiana Law Journal* but argue that his more recent pronouncements, seen against that background, testify to his capacity for intellectual growth. The press has, for the most part, accepted those claims uncritically. The Senate Judiciary Committee should not, for this portrait of Bork as a champion of First Amendment values has virtually no basis in fact. On examination it proves to be based on nothing more than a single concurring opinion and an ambiguous, self-serving reply to criticisms published in these pages.

In the October 1, 1983, issue of *The Nation*, I analyzed Bork's 1971 article to show what his general approach to the Constitution would mean for one highly valued tradition. When the *American Bar Association Journal* ran an item about my article under the memorable title "Here Comes Attila the Hun of the Constitution," Bork responded angrily. His reply, published in the *A.B.A. Journal*, was at once heated and carefully crafted. In tone it seemed to disavow the 1971 article, implying that I had been somehow unfair to take seriously what he had written thirteen years earlier; in fact it conceded very little. On June 16, 1984, in a second article in *The Nation*, I posed the questions that his reply had left unanswered. Bork did not respond directly. He did, however, address First Amendment themes in another forum.

While the *Nation/A.B.A. Journal* exchange was in progress, the United States Court of Appeals for the District of Columbia Circuit, on which Bork sits, heard arguments in *Ollman v. Evans and Novak*, a libel case. Some months later it ruled that the statements at issue were protected under the First Amendment. Bork took the occasion to file a concurring opinion, in which he expressed concern about the rising incidence of libel suits against the press. He wrote eloquently

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Jamie Kalven is the editor of A Worthy Tradition: Freedom of Speech in America, *by Harry Kalven Jr., to be published in January by Harper & Row.*

ıecessarily rough-and-tumble character of politi- se in a free society and offered some thoughts on aw might best be developed. The opinion is lucid ıl. It is not, as some of his supporters would have , the Magna Carta.

d be ungenerous to dismiss the *Ollman* opinion as ı attempt by Bork to counter the image of himself— t to 340,000 lawyers by the official publication of nized bar—as a menace to the free speech tradition. . be equally inappropriate, however, to disregard the ınd surrounding circumstances of the opinion. For ıst one of many instances that have stirred suspicions hether Bork's actions are dictated by principle or by ic considerations arising from his campaign for a seat Supreme Court. As they review his career and writings, ıators who will vote on Bork's nomination must take ot to misread opportunism as evidence of an open mind. r should they be deluded into thinking the *Ollman* on a significant departure from Bork's earlier phi- ɪhy. On the contrary, it is wholly consistent with the Amendment theory he advanced in 1971. At the heart ıat theory is the idea, associated with the landmark libel sion in *New York Times v. Sullivan*, that the central ıning of the First Amendment resides in the protection of public debate essential to democracy. So far so good. t he proceeds from that premise to the harshly narrow nclusions that First Amendment protection should be nited to "political speech" and that there should be no ɪnstitutional impediment to the suppression of speech that advocates forcible overthrow of the government or the iolation of any law."

Neither Bork's *A.B.A. Journal* reply to my article nor his ɔpinion in *Ollman* discloses to what extent and in what respects he continues to subscribe to that theory. The Senate Judiciary Committee should question him closely about this. There are several lines of inquiry:

§ In the *A.B.A. Journal*, Bork stated that he no longer takes the view that First Amendment protection is limited to political speech: "I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection." The phrasing of this apparent recantation is unnerving. What about literature and art? Do they fall within those "other forms of discourse"? On what basis would he distinguish the nonpolitical speech he would protect from that which he would not?

§ Bork would deny constitutional protection to speech that advocates the violation of any law. Does that include advocacy of civil disobedience? Under his theory would it have been constitutional for Alabama to jail the Rev. Martin Luther King Jr. for giving a speech urging sit-ins at segregated facilities?

§ Bork's *A.B.A. Journal* reply was silent on the issue posed by the advocacy of forcible overthrow of the government, although my article had sharply challenged his views on this question. The issue is central to political freedom. Such advocacy is typically part of a larger political critique. Hence to draw the boundaries of permissible advocacy is also to determine the limits of permissible criticism. Starting with the elaboration of the "clear and present danger" test by Justices Oliver Wendell Holmes and Louis Brandeis in the years following World War I, the Supreme Court has strived to fashion constitutional standards that allow for the fullest possible protection of political criticism while curbing advocacy as it approaches the threshold of criminal action. In 1971 Bork curtly dismissed that line of doctrinal development. Does he still regard the clear and present danger test as an unwarranted judicial invasion of the legislative domain? Does he still believe that the development of First Amendment doctrine should have stopped with *Gitlow v. New York*, a case decided in 1925 and long since repudiated, in which the Court held that legislatures should be free to suppress any advocacy of force or the violation of law, no matter how deeply embedded in political criticism, no matter how general and remote from action? (The senators might present Bork with the speech at issue in *Gitlow*—a pamphlet about which Justice Holmes, dissenting, tartly observed, "Whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration"—and ask him if he would allow it to be suppressed today.) Does he remain prepared to argue that the purpose he discerns in the First Amendment—protection of the political criticism essential to democracy—is best served when the task of determining the outer limits of acceptable criticism is left to the majority and to the government officials criticized?

Inquiry into Bork's First Amendment views has significance beyond the obvious importance of the freedoms at stake. This is the ground his supporters have chosen in their efforts to soften his image. Once the mirage of Bork as an ardent guardian of the First Amendment is dispelled, the pattern underlying his position on various constitutional issues emerges with harsh clarity. It is a pattern of unrelenting hostility to the entire enterprise of judicial review for the purpose of protecting individual and minority rights. When Bork and his supporters use the words "judicial restraint" to describe this orientation, they defame an honorable tradition. To reject the Bork nomination is not to reject that tradition. It is to reject a radical program fundamentally at odds with the way most Americans, conservatives as well as liberals, think about law, justice and the Constitution. ☐

SUPREME COURT WATCH
REPORT ON JUDGE BORK

The Supreme Court Watch project of The Nation Institute has produced an exhaustive analysis of Robert Bork's positions on several civil rights and civil liberties issues. To order a copy, write Emily Sack, director, The Nation Institute, 72 Fifth Avenue, New York, NY 10011. Please include $4 for shipping.

The **Chairman**. Gentlemen, thank you not only for your statements but for staying within the time. I appreciate it.

I have a number of questions, but I am going to try to reduce them to just a couple.

It seems to me the two things that are the paradox of Judge Bork in these hearings relate to this area, not "The Antitrust Paradox," but the Bork paradox.

The Bork paradox seems to be that he spends a great deal of time and effort in his writings and in his speeches and before this committee saying that he has a majoritarian view; he is the ultimate Madisonian, as he defines Madison's view; and that judges should not make laws, that should be left to us. And he appealed, I think somewhat persuasively to all of us, that he did not want to do our job; he wanted us to do our job; and judges should judge and not make laws.

Yet in this area, the paradox seems to be in the area of antitrust that he seems ready to completely discard what the will of the Congress is. And let me start with you, Dean, and I might add I did not read your whole résumé here, but you have written in this area. Antitrust is your field; is that not correct?

Mr. **Pitofsky**. Yes, that is right.

The **Chairman**. You are dean at Georgetown Law School.

Mr. **Pitofsky**. Right.

The **Chairman**. He says in his book "The Antitrust Paradox" and apparently has repeated it in various forums a number of times that antitrust law is analogous to constitutional because the central institutions in developing these laws have been the Supreme Court. That is, the Supreme Court has developed constitutional law, and he argues the Supreme Court has developed antitrust law.

Now, let me quote directly. He said, "Because the antitrust laws are so open-textured, leave so much to be filled in by the judiciary, the Court plays in antitrust almost as unconstrained a role as it does in constitutional law."

Dean, what does he mean by that comparison?

Mr. **Pitofsky**. Well, I think those two points are fair. It is true that Congress legislated in the antitrust field in very broad terms, and most antitrust over the years has been judge-made law and not specific congressional directives.

The question, however, is whether judges are free to completely ignore the will of Congress, even accepting that Congress gave them a rather broad mandate. I think many people feel that Congress gave judges a rather broad mandate.

But Judge Bork goes further than most of those people. Many judges would say the antitrust laws are vague and, therefore, we have the right to do the best we can. Judge Bork, in the excerpt that I quoted, says, "Even if I agreed that Congress meant what you said, I do not have to follow it."

The **Chairman**. What do you have to support that beyond that quote? That seems a startling comment. I have heard that repeated not only by you but others.

Is that just his engaging in his—I forget how it was phrased by others, but just excessive rhetoric? Is there any evidence that he means that, that ranging shots? Is there any evidence that Judge Bork really believes that he does not have to pay attention?

For example, if Congress comes up with a law that is clearly, from Judge Bork's perspective, anti-competitive, maybe even stupid, let us say we say we want to protect every business that has fewer than 50 employees and we are going to protect it in a way that is different than we have ever done it before and, in fact, makes commerce more difficult rather than easier.

Based on his writings and his statements, what would Judge Bork's view of that be in terms of whether he had to follow it?

Mr. PITOFSKY. I perhaps am not the best person to interpret his work, but I would think it is something like this:

If Congress said to judges strike down all mergers between companies with combined market shares of 20 percent, we would agree that he would have to do it. On the other hand, if Congress said strike down all mergers that lessen competition and they also said take into account when you are interpreting the phrase "lessening of competition" something more than efficiency—for example, the freedom of people to enter and exit markets, the question of whether or not you will have political instability because companies grow too large—he would say that is a directive that is unenforceable, unprincipled, vague, and therefore judges do not have to follow it.

The thing that is striking about all this is that it assumes that economics is precise and that the political dimension is vague. There are many people who would not agree with him on that.

The CHAIRMAN. Last point, and it is a yes or no question. Is he, on this issue, part of the law and economics school of the law?

Mr. PITOFSKY. He is. He is one of the most eminent and effective spokesmen for that group.

The CHAIRMAN. Thank you. My time is up.

I yield to my colleague from South Carolina, Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Thank you, gentlemen, for your appearance. Dean Pitofsky, Judge Bork wrote the book "The Antitrust Paradox," which you held up a few minutes ago, I believe in 1978. Or was that Mr. Brown? Which one of you help up that book?

Mr. BROWN. I did, Senator Thurmond.

Senator THURMOND. Now, he testified to this committee about that book that at that time, 9 years ago, he considered himself an amateur economist. The book was premised on the question of what best serves the consumer. He is interested in what best serves the consumer.

Judge Bork testified some of the arguments put forth at that time would appear wrong today, and he admitted that in testimony before this committee. He did not think so at that time, but as economics advance, the ideas change. I imagine your ideas have changed from years gone by on some things, have they?

Mr. BROWN. Yes, they have, Senator.

Senator THURMOND. Well, that is what Judge Bork said about this book. And so that would appear sufficient of what he wrote in 1978.

I want to say this. It is a little puzzling to me——

Mr. BROWN. Senator, do you want me to respond to that?

Senator THURMOND. If you care to and do not take too long.

Mr. **Brown**. I will respond very briefly.

The ideas that he put forward in "The Antitrust Paradox," Senator Thurmond, he put right into his opinions. He has had two major antitrust opinions; *Rothery* and *Neumann* are two of his major ones—the most major is *Rothery*.

In *Rothery*, he brought "The Antitrust Paradox" ideas right into the *Rothery* opinion on horizontal restraints of trade, put it right in there. The same theories there became the law or at least the law for the D.C. circuit in that opinion.

In *Neumann*, he brought his ideas from monopolization right into there. So he only allows for three areas of antitrust to be enforced: horizontal restraint sometimes, mergers and monopolization. And two of those, monopolization and horizontal restraints, he brought those theories in from the book.

So my feeling is that I am sure that my ideas have changed a lot in 10 years and everybody's have and his have, but his core area of belief seemed to be brought right into his judicial record in the last 3 years.

Senator **Thurmond**. That is your opinion.

Mr. **Brown**. Yes, it is.

Senator **Thurmond**. Well, he said that some of his ideas now have changed since then. He admitted that. Do you not admire a man who can change his mind on things and can advance with the times?

Mr. **Brown**. I admire that. I am just saying between 1978 and 1985 his ideas did not change.

Senator **Thurmond**. Now, yesterday, we had a panel of law school deans here. Did you hear them testify?

Mr. **Brown**. Yes.

Senator **Thurmond**. You were here yesterday?

Mr. **Brown**. I heard part of the law school deans.

Senator **Thurmond**. Any of you here yesterday?

Mr. **Abrams**. Yes.

Senator **Thurmond**. All of you?

Mr. **Pitofsky**. I was here for part of it, yes.

Senator **Thurmond**. Mr. Terrance Sandalow, dean of the University of Michigan Law School, he testified in favor of Judge Bork that he thought he was an able scholar and would make an excellent Supreme Court Justice. Mr. Steven Frankino, dean, Catholic University Law School, testified in favor of Judge Bork. He said the same thing.

Mr. Maurice Holland, dean, University of Oregon School of Law, testified in favor of Judge Bork. Mr. Ronald Davenport, former dean, Duquesne Law School, testified in favor of Judge Bork.

Mr. Eugene Rostow, professor emeritus, former dean, Yale Law School, testified in favor of Judge Bork. Mr. Thomas Morgan, dean, Emory University Law School, testified in favor of Judge Bork. Mr. Gerhard Casper, dean, University of Chicago, testified in favor of Judge Bork.

And also yesterday, another panel who were specialists on antitrust, the very thing you are talking about here now—and I do not know whether you consider them as well qualified as you are on it, but they are supposed to be experts on this subject. Mr. Thomas Kauper, professor, University of Michigan Law School and a former Assistant Attorney General in charge of the Antitrust Division, a man who was a former Assistant Attorney General and specialized in antitrust. That was his business. He testified in favor of Judge Bork and said he thought he was sound on antitrust.

Mr. Donald Baker, from Sutherland, Asbill & Brennan, Washington, D.C., another former Assistant Attorney General in charge of the Antitrust Division, he thought he was sound on antitrust. Mr. James Halverson, a partner, Shearman & Sterling of New York, and former director of the Federal Trade Commission Bureau of Competition, he testified in favor of Judge Bork. He thought he was sound. Mr. Phillip Areeda, professor at Harvard Law School, testified in favor of Judge Bork.

So what you are saying today is absolutely contrary to what those people said yesterday, and of course, you have a right to say it. There were seven law school deans who testified; there were four experts on antitrust who testified; and the testimony is just at odds. So that will just be up to the committee, of course, as to whose testimony they will accept.

Mr. ABRAMS. Senator Thurmond, there are many who are deans of law schools—Senator Biden opened today's hearing indicating letters that came from 40 percent of all the law professors in the accredited law schools in the country—who are opposed to Judge Bork's nomination.

I think what we are saying is that we think—and there is a strong body out there who believes this, who are experienced in antitrust enforcement—that Judge Bork is not in the mainstream of judicial——

Senator THURMOND. I understand that these people said he was in the mainstream. That is why you differ. So I say the committee will just have to settle that.

Mr. ABRAMS. And I think the reason why people say he is not in the mainstream, I think they give him credit, appropriate credit for raising the issue of efficiency as one of the considerations to take into account in analyzing antitrust cases, and appropriately so. But he makes the fundamental mistake by saying that efficiency is the only basis.

Senator THURMOND. That is your opinion. These other deans and experts on antitrust do not agree with you. So I say the committee will have to settle it.

That is all I have got to say.

Mr. ABRAMS. I think——

Senator THURMOND. I am through, Mr. Chairman.

Senator KENNEDY. He is entitled to respond. The witness is entitled to be heard. General Abrams, if you want to make a comment, then we will go to the next question.

Mr. ABRAMS. Yes. It is not my opinion that Judge Bork says that efficiency is the only basis upon which the antitrust laws are based and which should be considered in analyzing those issues. This is the very heart of Judge Bork's analysis as he uses that term "consumer welfare," which is not what normal people think because included as consumers are monopolists and cartels and price-fixers. And he does not take into account other economic issues such as the extortion of wealth from consumers to monopolists, the social and political dimensions that Senator Sherman had in mind and the others who since 1890 have enacted important antitrust legislation.

Then he takes the next improper step, which is to overrule Supreme Court precedent and——

Senator THURMOND. I say that is your opinion, and you have got a right to it.

Mr. ABRAMS. And I think what I am saying is that that opinion is not just of the Attorney General of the State of New York, but a large number of distinguished people who served as chairs of the Antitrust Division in the Department of Justice, who are deans of law schools, professors of law schools, and individual practitioners.

The CHAIRMAN. The Senator from Massachusetts.

Senator KENNEDY. Thank you, Mr. Chairman.

I, too, want to join in welcoming the panel. It is a very distinguished panel. General Abrams, is probably the dean of Attorneys General in the country and, as you pointed out earlier, has important responsibilities for Attorneys General across the country in the antitrust field. Now, General Brown is heading up that particular organization of the Attorneys General, and it is a pleasure to have Professor Pitofsky back. He is not only a dean at Georgetown and a student and academician on antitrust, but he has also been willing to enter the public world as a member of the Federal Trade Commission where he used his intelligence and knowledge of antitrust laws to serve the public interest of the people of this country.

I welcome the panel, and I think there is important weight to their comments.

We all know that there are limitations on time, and what I would like to have, first of all, from General Abrams and General Brown, is this. One of your prime responsibilities as attorney generals is the protection of consumer interests.

But how, if Judge Bork's views were the law of the land, and given even his current statements, how would they affect your ability to protect the consumers? In his case, in New York, and, in your case, General Brown, in West Virginia.

Consider activities, for example, that you have been involved in as attorney general in the past months, and things that you might be interested in doing in the future. Then I would like to come back to Professor Pitofsky in another area in terms of judicial activism, whether your perception of Judge Bork in the antitrust area is really—I think you have made a comment "outside the mainstream." Do you believe, based upon his decisions and recent statements, that he would be a judicial activist and how that may very well affect antitrust policy.

I think the people in our country want to know how this nominee is going to affect the quality of their lives, and from what I know in terms of his antitrust positions, they will have an important impact on the average citizen and their ability to purchase various goods, whether it is from discount houses, whether it is shoes for their children, clothes, the whole range of different appliances. Tell us about it.

Why should the consumers in the States that you represent be concerned about this judge, should his view and position on antitrust law become the law of the land? General?

Mr. **Abrams**. If Judge Bork's views were to be adopted, that would virtually eliminate 90 to 95 percent of antitrust enforcement, and the kinds of protections that consumers have known for the better part of a century.

Let me try to translate that into a very dramatic situation that occurred in New York and some other States, and how it impacted on our consumers.

One of the things that is on the Bork agenda is to legitimize vertical price-fixing which is an illegal practice under present law.

We recently brought a case against——

Senator **Kennedy**. Just explain that, quickly, and then get on to the heart of it.

Mr. **Abrams**. Okay. That means that under present law—enacted by the Congress, and reaffirmed by the Congress in the last 3 years under budget amendments that the Congress passed in 1985 and 1986, and 1987, because the Justice Department was filing briefs that were in derogation of Congress' will here. The Congress took action.

Under that concept, a manufacturer could not impose upon a retailer the price that the retailer could charge. And that happened, recently.

A complaint came to the New York office from a retailer saying that the Minolta Corporation was dictating a price below which no other retailer could sell; otherwise, they would be threatened with the cutoff of supply for a new camera, the Maxuum 7000.

And we took that on as a case, settled it pretty quickly, got relief for 500,000 consumers involving millions of dollars, and in the end, 37 different States opted into a settlement, whereby—all consumers had to do was send in the receipt, they got $15 back for any purchase of a Minolta camera during an 18-month period of time.

So every day in the marketplace, there are situations where money is taken from the wallets of consumers because of predatory practices, anti-competitive practices, and if Judge Bork's agenda, was ever implemented, these consumers would have no protection from either federal enforcers or State enforcers.

Mr. **Brown**. It would be a disastrous impact, Senator Kennedy. I am glad you asked. The antitrust laws really benefit all of us. They benefit consumers in the way of lower prices. They benefit taxpayers because when we stop bid rigging on the State level we help our taxpayers.

They benefit business, bold entrepreneurs, people that want to compete, take chances. Those are the businesses that really benefit when you enforce the antitrust laws.

This non-enforcement would have a terrible effect. As General Abrams is pointing out, we have both vertical and horizontal restraints.

Restraints between competitors are horizontal. Restraints between supplier and retailer are vertical. He wants to cut it off both ways. He says no enforcement vertically, meaning manufacturers can demand, and suppliers can demand that retailers charge at a certain price, but he also wants to reduce competition between competitors by allowing mergers down to only three companies.

Well, the effect is when you cut off horizontal and vertical competition you have no intra-brand competition which we badly need when there are oligopolies, when there are only a few companies competing, and then you cut off any change—by having only a few companies, you then cut off any chance on intra-brand by having no price competition, and a total ability to have the restraint-trade——

The CHAIRMAN. What do you mean by intra-brand? What do you mean by intra-brand. Would you define it.

Mr. BROWN. A good question. Intra-brand means the same people selling the same product but competing with each other on price. Different Chevrolet dealers in town competing with each other on price.

We have got to have intra-brand competition, when there is only a few manufacturers in the market. Judge Bork would allow the few manufacturers to shrink to only about two or three per industry, and then he would say, also, we will have no intra-brand, no competition within that brand by different retailers.

So all the two or three companies would have to do is say, well, what's the advertised price of our competitors? Well, good, we'll all keep the price that high. They will never have to worry about discount stores. They will never have to worry about transshipping, off-brand sales—all the things that are used to bring price competition.

And there will be terrible suffering by our consumers because they will have to pay a lot more money for goods and services.

Mr. ABRAMS. Senator, you asked for a practical application. I thought of another one, because Americans are beer drinkers, and we have got a major beer case challenging vertical restraints in that industry.

And under the Bork theory, we would never be able to bring this kind of a case against the major beer companies. We have seen concentration——

The CHAIRMAN. Tell us what you mean by that.

Mr. ABRAMS. Okay. The major brewers say that we will only allow one official distributor in a big area—in New York City it is a county, in the city of New York, and some of those counties have 2.5 million people.

So only one distributor will be recognized by the manufacturer for official distribution.

The CHAIRMAN. Budweiser says if anybody is going to drink Budweiser beer in Manhattan they have got to buy it from this one distributor?

Mr. ABRAMS. That is right. And in the past you had enormous transshipment, competition, a lot of different companies being able to sell within territories such as Brooklyn.

Now you have got limitations mandated by the brewer, and what has happened since that has gone into effect several years ago in New York, the price of beer has gone up 40 percent, way in excess of anything that is comparable in the market basket, and we have brought a law suit challenging that, saying it is anti-competitive, it is in violation of the antitrust laws.

So we are talking about pocketbook issues, real issues—cameras, beers, all kinds of clothing, things that people go and buy every day in department stores and supermarkets.

And that is why our hands would be tied as State enforcers, and the federal government, if, indeed, this Bork agenda was ever enacted.

Mr. PITOFSKY. I will be very brief. May I just add one word to this discussion of territorial allocation which Attorney General Abrams was talking about.

Many people feel the law should be relaxed in that area. The difference between Judge Bork and many conservative critics is he believes such transactions should be absolutely legal, not even challengeable, regardless of market share or business justification.

Senator Kennedy, you asked the question is there any reason to think that the Judge Bork of 1987 is different than the person who wrote these articles.

I think in this area there is no reason. I know that Judge Bork has modified his position in the constitutional law area and with respect to civil rights, but this is the work of a lifetime, and I see no reason to think that he has changed his views.

He has only written a few antitrust opinions on the court. The one that was the most ambitious was *Rothery.* There was no quarrel about who was going to win the case. Everyone that looked at the case agreed the defendant should win, and Judge Bork wrote that opinion.

But it is striking that he did three things in that opinion. One, declared that only economics counts, which I think the Supreme Court has never said.

Second, he declared, as he had written in "The Antitrust Paradox," that if a company has a small enough market share, nothing it does under any circumstances, for any reason, can be illegal.

It is interesting that the Supreme Court, that very week, nine to nothing, adopted the opposite view.

And then third, he said in that opinion that two Supreme Court cases he recognized were inconsistent with his theory had been "effectively overruled," although of course the Supreme Court never said anything of the kind. Maybe it will turn out they are "effectively overruled," but the *Rothery* opinion reflects a very aggressive way of deciding cases, and of introducing special views into the law.

The CHAIRMAN. Thank you.

Senator THURMOND. Will you allow me to make one statement now?

The CHAIRMAN. Sure I will.

Senator THURMOND. Mr. Abrams, speaking about that beer bill, I agree with you thoroughly on that, and that is a bill that Senator Metzenbaum and I opposed. The committee reported it out. I think it is on the Senate calendar now. That bill should not be passed, is not in the best interests of consumers.

Mr. ABRAMS. We welcome your support, Senator. You are a powerful voice on that issue for us.

Senator KENNEDY. I think there were three of us.

Senator THURMOND. I just wanted you to know that so far as that is concerned, I am interested in the consumers, but I think Judge Bork is, too, and I think he would be fair to the consumers.

The CHAIRMAN. Well, speaking of beer, let's find out what has happened at the Three Ribbon Bar.

Senator SIMPSON. The Blue Ribbon Bar.

The CHAIRMAN. The Blue Ribbon Bar. I yield to my colleague from Wyoming.

Senator SIMPSON. Mr. Chairman, I thank you, and this is a true story, that in my youth I weighed 260 pounds, had hair, and thought beer was food. I really mean that. I actually weighed that much. Well, back to beer. Now you see, Dennis DeConcini was undecided. You lost him. You just lost him. [Laughter.]

That is his bill.

Senator KENNEDY. I am glad he is not here.

Mr. ABRAMS. I am glad he is not here this morning.

Senator KENNEDY. Do not tell him.

Senator SIMPSON. I am going to bring it to his attention.

Mr. ABRAMS. Senator, he knows my views on that. I testified before him on that.

Senator SIMPSON. I think so. Well, I happen to be on Dennis' side on that one, because the bill says that this will be done as long as it is not anti-competitive, and that the State antitrust laws will remain in force—well, just a second, I have only got 5 minutes, guys. We can argue that later.

I would not be surprised, at all, at the number of law-school professors who have written on this issue and expressed their anti-Bork sentiments, because I really think they may have—and it is just my hunch—have reviewed the very studied distortion of his record which was sent out, and which changed the American Bar from an "exceptionally well qualified" just 5 years ago, to now, a split decision of 10-4-1 which is odd to me, and remains odd to me.

Are any of you members of the American Bar? All of you?

Mr. PITOFSKY. I am.

Senator SIMPSON. I was, too, in my practice. That has been a very curious thing. Judge Bork has written a book, and we find that it has been cited, approvingly, by the United States Supreme Court, the book, "The Antitrust Paradox," in no fewer than six majority decisions of the United States Supreme Court, by such diverse Justices as Bill Brennan, Lewis Powell, Stevens, Chief Justice Burger, and Justice O'Connor in a recent case of *Jefferson Parish*. Justice Blackmun. And I do not believe that anyone would say that those decisions are outside the mainstream.

But what is really curious and fascinating to me is that we have an endorsement here which is worth all the rest of them combined, and that is the endorsement of 15 past chairmen of the Antitrust Law Section of the American Bar Association.

That letter is dated August 7th. This is from the immediate past chairman, and every single chairman back through 1968, that final one being Miles Kirkpatrick—it is a "Who's Who of Antitrust" in the United States. And they said that, indeed, they had a strong endorsement of Judge Bork, and that is each and every one of them, and they said, "Judge Bork's writings in this area have been among the most influential scholarship ever produced."

They go on to say that his book has been referred to and cited by the U.S. Court of Appeals in 75 decisions since its publication. It goes on with some statistics, and then, of course, it challenges Colman McCarthy's article which was quite harsh.

But here it is. And here is the final sentence. It says: "Fortunately"—and this is signed by all of those gentlemen, fifteen of them, gentlemen and ladies. "Fortunately, the mainstream view—this is a quote—which no one has helped to promote more than Judge Bork, is that the proper antitrust policy is one which encourages strong private and government action to promote consumer welfare, rather than unnecessary government intervention to protect politically favored competitors."

Now that is a quote from that. Judge Bork testified right here on September 17th regarding his alleged advocacy of court-made law and antitrust matters. He replied to Senator Metzenbaum that Senator Sherman himself, the author of the original legislation, said that the courts will have to evolve the rules of antitrust, and I assume that he later related it was because the statutes were so vague in that area.

And so this is the situation on antitrust, and it seems very puzzling to me that in the most recent fascinating case, a very lucid opinion—and he has written four opinions involving antitrust matters.

The one, *Rothery Storage and Van Company* v. *Atlas Van Lines*, he applied principles of economics in his conclusion, and ruled that the policies adopted by Atlas Van Lines served the efficiency producing purpose of preventing local carriers from obtaining a hidden subsidy by using the Atlas national reputation and resources when hauling goods.

He was joined in that opinion by Judge Ruth Bader Ginsburg. Judge Pat Wald filed an opinion concurring in the judgment. Those are the things that we have to grapple with as we listen to the pros and the cons of Judge Bork, and not one single person—I take it back, we had one who has come in here—and challenged the reality that this is a remarkable man, a remarkable intellect, a sweeping, almost extraordinary intelligence, whose honesty is beyond question, his integrity is above reproach, his decisions are firm and readable. But.

And then the "but" part is not like the usual "but" part when people say that in normal social exchange or intercourse. The "but" part is that he is anti-Semitic, anti-black, anti-woman, would sterilize his fellow human beings, and that is the troublesome part about this entire thing for me.

If the "but" part were just that, you know, his stuff is off the wall, and this and that, but to go and dredge deep, deep down, and pull this stuff up, and then ship it out around America—and let me tell you, the opponents know how to ship the stuff. I can tell you that. They were ready for this guy.

When Scalia got the nod, Bork was next in the tank, and they went to work right then, and it is awesome to watch, and it is rather disturbing to me because is it not just, you know, light stuff when the challenges are made. It is heavy stuff. You know, that we are taking the toys away from the kiddies, and, you know, the price of beer is going to go out of sight, and Christmas will be more expensive, and Robert Heron Bork did this. I mean, really, it is beyond this Member's comprehension.

I have never seen anything like it in 9 years, but we will see it again, I can tell you that. Thank you.

Mr. **Pitofsky**. I have heard often the claim that Judge Bork's guiding star is consumer welfare in the antitrust field. I just want the committee to understand, that that is a technical economic term that has a special meaning to people in the antitrust field.

If there were a practice that was efficient, and enriched manufacturers, and did not help consumers at all, that would be regarded by Judge Bork as "consumer welfare." I just hope that people understand that "consumer welfare" does not directly relate to the welfare of consumers.

Senator **Simpson**. Well, I do understand it. I just wonder if the other 15 members of the Antitrust Section of the American Bar Association understand it, or they would not have said what they did.

Mr. **Pitofsky**. Senator, it is a very distinguished group and I think the members are entitled to respect.

On the other hand, had you had a panel of academics in antitrust, or private trial lawyers in antitrust, or government trial lawyers in antitrust, and you brought up 15 presidents of those organizations, you might have had a different, less unanimous result.

Senator **Simpson**. We only have one expert on antitrust on this panel and he is next, and we——

Mr. **Abrams**. Senator, may I offer a comment, too, just in response to some of the things, because it has come up over the last couple of days.

Senator Simpson made reference to the fact that some Supreme Court and circuit court decisions make reference to Judge Bork, and that is true, and Judge Bork does deserve credit for raising efficiency as an issue that must be taken into account when analyzing antitrust cases.

And that is where that reference is made. It is not made in terms of approval of the Bork agenda, of completely eliminating the law on vertical restraints, both of a pricing nature and a non-pricing nature, and his rule with respect to mergers.

On those substantive issues, the Supreme Court has held firm and has not adopted the Bork position. They refer to his writings as it relates to his analysis of efficiency and some of the economic considerations that are taken into account.

And when one looks at the decision in *GTE Sylvania*, the reference is made to Bork, but in the end, it is a decision that is in opposition to the Bork view, in terms of the rule of reason analysis that the Supreme Court continues to hold to.

Senator **Simpson**. I thank you very much, it is a very complex area, and I would just ask to put in the record, Mr. Chairman, the summation of Robert Bork in his book at page 407, the book, "The Antitrust Paradox," where he speaks of his philosophy of free entry and open markets, and vigorous competition, and I thank you very much.

[The information follows:]

Bork, The Antitrust Paradox 407

quasi-governmental groups like organized exchanges. Predation through such institutions appears to be more frequent than has been supposed.

Finally, there is the extremely important task of bringing the original and still valid antitrust philosophy of free entry, open markets, and vigorous competition to those areas where anticompetitive behavior now occurs with governmental blessing. This can be done in two ways. The first is intervention in federal, state, and local regulatory processes to extend the competitive ethic as broadly as possible. There are many regulatory schemes that leave room for antitrust in their interstices. Much regulation does not, for example, assume the suppression of all competition in the industry; but through inattention or worse, regulated industries have been permitted to cartelize in ways not necessary to the success of the regulation. Antitrust enforcement can challenge such developments and make clear the limits of regulation as well as the claims of competition. *

More than this may be done, however. The Antitrust Division is not merely a litigating agency; it has important responsibilities in the formulation of new legislation. It should expand its portfolio to encompass testimony on the merits of new legislation that has implications for competition. The Division may often be unable to litigate once regulation is in place, but it is able to testify and to publicize its opposition to anticompetitive measures and to seek the repeal of legislation that has needlessly suppressed free market forces.

Positive programs such as these would be enormously beneficial to the wealth of our nation and to the competitive ideal. Such programs would, moreover, elicit enough opposition from affected industries to dispel any notion that a policy of free markets is in any sense narrowly pro-business.

The CHAIRMAN. Thank you. Before I move to Senator Metzenbaum, I would like to state two things. One, the fact of the matter is each of the witnesses that have come before us on all subjects come with—as has been pointed out by my colleague from Wyoming—some understandable, and not even detectable, in many cases, bias. As attorneys general, your job is to protect the consumers of your State as you see it, and quite frankly, I imagine not many of the American Bar Association panel, on the Antitrust Division, represent other than the major corporations in America.

There is nothing wrong with that. There is nothing wrong with the fact that Mr. Cutler and Griffin Bell represent the major corporations in America, because they also can speak to it, both sides of this issue, with alacrity.

I just want everybody to understand, that we all come from a certain spot in this, and as someone quoted yesterday, one of the professors who was here on the pro Bork panel said that he had someone once, that he worked with—oh, I guess it was Elliot Richardson—and I am paraphrasing.

I think he said where you stand depends upon where you sit, and, obviously, there is some truth to that. And so the American Bar Association Antitrust Panel is not likely to be made up of people who are bringing suits that are designed to protect, you know, wholesale/retail price maintenance.

You know, it just depends on where you are. So I think we should take each of you for what you say, and we make a judgment on whether or not the job you have to do impacts upon that or not.

The Senator from Ohio.

Senator METZENBAUM. Mr. Chairman, I want to just take one second to correct the impression that these 15 former antitrust committee chairmen endorse Judge Bork.

All they have done in their letter is to take issue with an article written by Colman McCarthy, and to indicate that "The Antitrust Paradox" written by Judge Bork is among the most important works written in the field in the past 25 years.

But these 15, or 18 men and women did not endorse Judge Bork.

And secondly, I should point out, that the fact that they were chairmen of the Antitrust Committee of the American Bar Association does not prove a whole lot either, because along the lines of what the Chairman just said, it depends upon where you sit and what your perspective is.

Almost without exception, every one of the chairmen of the Antitrust Section of the American Bar have been those who represent defendants in antitrust cases. They are the corporate lawyers, and they are not those who have been on the side of the consumers of this country.

And so I do not think that that is particularly significant. I think what is significant is what the chairman did, I think yesterday, when he put in the record the statement of 1925 professors and law-school deans representing 40 percent of the total number of professors in the country, who have indicated they are not supporting Judge Bork's candidacy.

Coming back to you, Mr. Abrams, let me get into an issue that I am not sure everybody understands. It has to do with the subject of retail-price maintenance, and you know what it is, and I know what it is, but I am not sure that everybody else understand what it is.

We both know that the Supreme Court has time and time again said that you may not maintain prices, you may not have resale price maintenance, and we know that Judge Bork has seriously criticized the Supreme Court in that respect.

In simple layman's terms, what is resale-price maintenance all about?

Mr. **Abrams**. It is price-fixing where the manufacturer of a product dictates and controls with a retailer what that price should be at the retail level, what price the consumer will pay.

So it really prevents competition. These days we have got a lot of discounters, we have got a lot of operations in the country that want to compete and operate on a very low profit margin on all kinds of electronics, appliances, or clothing.

And when you have got a manufacturer who says you must charge $100 and nothing less—so if a storekeeper wants to cut down on the profit margin and charge $95, he will not be able to do that.

Senator **Metzenbaum**. And Judge Bork says the manufacturers should be permitted to maintain prices to say you must charge $100 and not charge $95, is that correct?

Mr. **Abrams**. That is what Judge Bork thinks, but that is not what the Supreme Court says is the law, that is not what the U.S. Congress says is the law.

The Supreme Court has said it, since 1911, in the *Dr. Miles* case. The U.S. Congress has time and time again reaffirmed this, when they repealed the fair-trade laws in 1975. They reaffirmed that view and attitude.

They did it in the last 3 years when——

Senator **Metzenbaum**. More recently, we actually, at the instance of a prominent Republican Member of the Senate, put on an appropriations bill a bar to the administration filing an amicus brief in a case in which they wanted to argue that resale-price maintenance was legal, and the Congress said you may not even file a brief.

Mr. **Abrams**. That is absolutely right, Senator, and it was a bipartisan approach. Congressman Hamilton Fish, a Republican from my State led that fight. Congressman Hyde, a Republican from Illinois was very supportive. President Reagan signed the legislation.

Senator **Metzenbaum**. Senator Rudman, I think, led it, and Senator Gorton, here, in the Senate.

Mr. **Abrams**. And so here we have an example of what troubles many of us—the will of the Supreme Court, the will of the Congress, and yet Judge Bork saying it is right for a judge to just overrule Supreme Court precedent, and to refuse to enforce laws that have been passed by Congress.

Senator **Metzenbaum**. Dean Pitofsky, you mentioned something to the effect that Judge Bork would permit mergers down to maybe as few as five companies. General Brown mentioned two.

My recollection is that is what Judge Bork said, that he would not be opposed to eliminating all the competition in a particular field, even if there are only two companies left, and then at one other point he said, well, maybe as many as three.

What impact would it have upon the American people if his view were to prevail, in your opinion?

Professor **Pitofsky**. As to his position he has said two different things.

He has written that he would be comfortable with mergers up to 60 or 70 percent of a market, but as a tactical concession, knowing what the realities are, he would settle for a line at about 40 percent.

I think it would change the nature of the country. We are already witnessing the most massive wave of mergers that we have seen, certainly since the late 1960's.

The Reagan administration has been rather lenient about merger enforcement. The striking thing about Judge Bork's position is that many, perhaps most of the mergers that this lenient administration has challenged, would sail through under his views.

Senator **Metzenbaum**. Thank you.

Mr. **Pitofsky**. Because mergers down to two or three firms—well, those are rarely attempted.

Senator **Metzenbaum**. Thank you, Dean Pitofsky.

I had a question for General Brown, but I note my time has expired. I did want to say, Mr. Chairman, that I was not here yesterday when those in the antitrust field who support Judge Bork were testifying.

That was not a deliberate slight on my part. I was on the floor, and I am just sorry that I did not have an opportunity to inquire of them, but I just want to say that I did not stay away for any special purpose other than to be on the floor of the Senate.

The **Chairman**. Thank you. The Senator from Iowa. Senator Grassley.

Senator **Grassley**. If I could, as long as Senator Metzenbaum brought up some points about antitrust law—and I know that, based on Senator Metzenbaum's questioning of Judge Bork himself, that there is great disagreement here—I would like to do this for Senator Metzenbaum's benefit as well as anybody else. In 1982, shortly before he voted to put Judge Bork on our second highest court, he said. "The subject of these hearings is not whether we agree or disagree with Judge Bork's economic views or antitrust philosophy." That is what Senator Metzenbaum said.

He also said that he disagreed, across the board, with Judge Bork's views in 1982, and yet he joined the rest of us in the Senate in unanimously approving Judge Bork, so——

Senator **Metzenbaum**. If I could just point out to my colleague, briefly——

Senator **Grassley**. You can.

Senator **Metzenbaum** [continuing]. That the difference is, that as a member of the circuit court of appeals, he is duty-bound and has no choice but to follow the Supreme Court decisions that have been made previously.

As a member of the Supreme Court, he is in a position to change those previous decisions, and that is what makes the situation so frightening.

Senator **Grassley**. Well, we are going to have plenty of opportunity to debate this on the floor of the Senate, but I think it does get back to the issue that most of us on this side have been trying to emphasize about Judge Bork. That you are going to find, whether it is antitrust law or a lot of other interpretations of the Constitution, you are going to find him much more in the mainstream than what the propaganda put out has led the public to believe.

And I personally look forward, very much, to the opportunity to get this out before 100 Senators, and people who are going to have a fresh view of it.

So we are going to have an opportunity to show this, and I respect Senator Metzenbaum's statement about the importance of the Supreme Court over the court of appeals.

But, on the other hand, I think it is important for us to look at the realities of Judge Bork's views and the fact that the view that he is an extremist is just entirely wrong.

Mr. Chairman, I have no other questions.

Senator METZENBAUM. Thanks, Senator Grassley. The expert on the beer bill, as well other areas, Senator DeConcini.

Senator DECONCINI. Thank you for raising that question, Senator Metzenbaum.

Senator METZENBAUM. I did not raise it. [Laughter.]

Senator DECONCINI. I appreciate your agreement that we can have a mark-up on that bill in your committee.

Mr. Abrams, seeing that the bill has been raised by someone else here, not me, I understand that you indicated today, that your study shows that as a result of territorial franchises, the retail price of beer has gone up. Is that right?

Mr. ABRAMS. That is right. Not only just gone up, Senator.

Senator DECONCINI. Yes, gone up substantially based on your study, the New York study.

Mr. ABRAMS. And gone up beyond other products in the food-market basket.

Senator DECONCINI. Mr. Abrams, just for the record, because we are not going to debate this bill now—but just for the record, on August 4th when you were before the Senate in hearings, did you not respond to my question, that your study was based on retail prices, and in fact you had no evidence whatsoever to show that wholesale prices had gone up as a result of territorial franchise? Did you not say that to us?

Mr. ABRAMS. Of course, Senator, because——

Senator DECONCINI. That is all I want to know because I think——

Mr. ABRAMS. The harm is to the consumer.

Senator DECONCINI. Well, no, the point is the increase had nothing to do with territorial franchises because this is a wholesale territorial franchise bill.

Now you have your position, but I resent you coming here and leaving an impression that you did not concur until I had to ask you, whether or not your statement on August 4th as to your study dealt with the retail prices and not with the wholesale prices, and that beer beverage bill deals with wholesaler and territorial franchises, and not retailers.

Mr. ABRAMS. With all due respect, Senator, but when you have got an exclusive territory for a wholesaler, that impacts on the price that he charges to the retailer, and that impacts on the price he charges to the consumer.

Senator **DeConcini**. Didn't you just say, Mr. Abrams, that you agree with your statement of August 4th, that that study did not conclude, at all, that territorial franchises increase the beer price, or malt-beverage beer price on the wholesale level?

Isn't that what you said? Because I will show you the record. I know it is.

Mr. **Abrams**. I remember what I said. All I said was that the study that we quoted, which was a study not prepared by any industry, or for this particular issue—it was a study that is prepared on a regular basis, over the past decade, by the consumer affairs agency of the government of the city of New York—showed that consumer prices rose——

Senator **DeConcini**. That is retail prices.

Mr. **Abrams**. That is correct.

Senator **DeConcini**. Okay. Well, Mr. Chairman, I am not going to debate this any further. I am going to put in the record, before its close, the exact question and quote from the August 4th hearing, so we can take that up at another time when the Senator from Ohio feels compelled, I hope, to have some mark-ups. Thank you.

[The material follows:]

S. 567—Malt Beverage Interbrand Competition Act

Senator **DeConcini**. Mr. Abrams, let me ask you this question. Am I correct that the New York survey that I understand you discussed while I was not here was a retail beer price survey, and that based on that retail beer price survey data, you have drawn conclusions about wholesale prices?

Mr. **Abrams**. Senator, first of all, yes. The data that was compiled, again, not by an industry organization, not in terms of a request to try to shore up or justify a specific piece of legislation that is pending before Congress, but as part and parcel of an overall bread basket analysis that is going on for many decades by a governmental agency—obviously, there is a relationship between wholesale price and retail price.

What this survey clearly showed was a price of beer before there was the creation of exclusive territories tracked over a 5½-year period, and demonstrated that during that period of time when you had the elimination of transshipment and vigorous competition, intra-brand competition—we are talking about a product that is rather unique in the marketplace where there is high brand loyalty because of the hundreds of millions of dollars of advertising expenditure that the beer companies produce to generate loyalty.

You find this precipitous increase, and you can track it week after week over a five-and-a-half year period. I think there is an inescapable conclusion.

Senator **DeConcini**. Mr. Abrams, did you, in fact, analyze the wholesale part of it and the competition and the prices? Did you zero in on that? Did that study do anything about the wholesale prices, or was it solely what relation flows from the fact that retailers have to buy from wholesalers?

Mr. **Abrams**. Again, Senator, what we did was show what the retail price of beer was week by week over a 5½-period during the time that there was the imposition for the first time of exclusive territories.

Senator **DeConcini**. Based on retail prices?

Mr. **Abrams**. Correct.

Senator **Simpson**. Well done.

Senator **Metzenbaum**. Proceeding forward with the beer bill today, I will be happy to hear from Senator Specter.

Senator **Specter**. Thank you very much, Mr. Chairman.

The questions of interest to me do not go so much to the substance of what Judge Bork has written, but to his comments about the lack of substance of congressional understanding of economics, and congressional understanding of the underlying antitrust laws, and a flavor, in some of Judge Bork's writings, that his heavy reliance on legislative intent, and what he calls Madisonian majoritarianism, has not been applied when it comes to his analysis of the antitrust laws.

That he has expressed himself, in a sense, that courts are free to disregard the language of the statute and disregard the structure of congressional intent.

Mr. Abrams, I wonder if you would care to comment on that.

Mr. **Abrams**. Yes. This is what disturbs me, and what brings me to my conclusion, and what brings me here today to urge his rejection.

It is out of the mainstream of the approach of judges in this country to just, if you disagree with Supreme Court precedent, a judge is free, according to Judge Bork, to just rule any way he wants and, you know, in terms of the Congress you can refuse to enforce a law if you disagree with it.

He has strong language ridiculing the ability of Congress to legislate sensibly in this area. He has strong adjectives applied to some of the most distinguished judges to ever sit on the United States Supreme Court—Harlan, Brandeis.

Senator **Specter**. Mr. Abrams, aside from his characterizations of Congress as being institutionally incapable of legislating in the field, is he wrong about it?

Mr. **Abrams**. In terms of Congress' ability——

Senator **Specter**. Of Congress' ability to legislate in the field and, really, to give specific mandates to the courts to carry out a policy with clear-cut goals and standards.

Mr. **Abrams**. Of course he is wrong. The Congress has every right to do it, and the Congress has done it in a very significant way. The antitrust laws have been one of the most significant contributions of the U.S. Congress to the development of this nation, in terms of the building of our economy, in terms of the protection of our consumers.

It has had an important social, political, and economic consequence for the development of this great nation for the past century.

Senator **Specter**. What about the point which Judge Bork makes, that the economic direction of the antitrust laws was materially affected by his mentor, Aaron Director, and the Chicago School of Economics? That very material changes were made, and that the thrust of antitrust enforcement, and the thrust of economic regulation has really been materially advanced by the work which Mr. Director did, and which Judge Bork and others from the Chicago school did?

Mr. Pitofsky, would you take a crack at that one.

Mr. **Pitofsky**. Yes, I would have to say that is a fair appraisal. I believe that the Chicago school, many members reflecting Professor Director's theories, have had a great influence on antitrust, in my opinion for the better.

The real issue is not so much whether antitrust of the 1960s should have been modified—because I think most people think it should have and Judge Bork has been a leading figure in that movement—but, rather, how far the pendulum is going to swing.

As I tried to emphasize in my testimony, while the analysis in "The Antitrust Paradox" is quite effective, the bottom line is really more extreme than any other member of the Chicago school is likely to advance. Certainly, it is among the most conservative.

Senator SPECTER. Well, would you say overall, Mr. Pitofsky, that Judge Bork has had a beneficial influence in the antitrust field as a result of what he has written, what he has done?

Mr. PITOFSKY. I think his scholarship has contributed constructively to the antitrust debate. I believe, however, that if he were in charge of antitrust policy and could introduce his entire program, we would be without effective antitrust enforcement.

Senator SPECTER. Do you think there is any significant likelihood of that on the Supreme Court, even if Judge Bork were confirmed, that he could so overpower the Court to have that kind of a drastic consequence?

Mr. PITOFSKY. No, I do not think he could overpower the Court, but there are only nine votes there. And what you are doing is adding one Justice who believes essentially that the last 50 years of bipartisan antitrust enforcement was largely misguided.

Senator SPECTER. I have just one further question, if I may, Mr. Chairman.

Senator DECONCINI. Go ahead, Senator Specter.

Senator SPECTER. One of the lines which is very emphatic from Judge Bork's book is that "Congress as a whole is institutionally incapable of a sustained, rigorous, and consistent thought that the fashioning of a rational antitrust policy requires. No group of that size could accomplish the task."

I cite that reference because it is representative, in a sense, of what Judge Bork has written in other fields. And part of the evaluation that we have to make on this committee and in the Senate is whether these views really represent his ultimate thought on the matter, or whether they are a part of the style of very forceful writing, as one of the professors testified to on Friday; that academicians approach these subjects with an overall direction to decimate all existing theory in institutions, if any gets in their way; and then to reconstruct a rationale and a philosophy to promote a thought; and that in this kind of very forceful language, that Judge Bork may really be seeking to make a point in an academic style as opposed to really setting down a final thought that he might have substantively.

Mr. BROWN. Senator Specter, I believe that he wants to bring the thoughts of "The Antitrust Paradox" right into his judicial work, because he has done that. In *Rothery*, he took what was perceived as a rule of reason case, probably a vertical restraint case, made it a horizontal case in order to write his whole theory on horizontal boycotts and horizontal restraints of trade.

In the *Neumann* case, he took, again, a pretty simple case on its facts, an easy case to decide, and brought in his theories on monopolization and various predatory activities.

So I think that his ideas between the time he wrote the book and the time he got on the Court remained the same, and I think he has made every effort to bring those ideas right into the Court work on the Second Circuit. So I not only see no difference, I see an effort to write these theories right into the law.

Senator SPECTER. Thank you very much, General.

Thank you, Mr. Chairman.

Mr. PITOFSKY. May I add just a word? There is no reason to think that Judge Bork has abandoned these views. That is why I quoted from his statement just six months ago, which is along very similar lines.

Senator DECONCINI. Thank you, Senator Specter.

The Senator from Vermont.

Senator LEAHY. Thank you.

Dean Pitofsky, let me follow up on that, because I was intrigued and I want to make sure I fully understand your statement.

First, just to put it in context, Judge Bork testified that he would enforce the letter of the antitrust statutes. Now, do I understand correctly from your statement that you feel that is a change from his prior position?

Mr. PITOFSKY. No. His position is complex, but I do not think it is a change. I think if Congress pins down a judge and says do X and not Y, Judge Bork will do it. But I think Judge Bork's philosophy is that Congress is on the wrong track in legislating in the antitrust field; only economics counts; and a judge has the right to ignore loose directives from Congress.

Senator LEAHY. So that you do not see a significant shift in his position?

Mr. PITOFSKY. None at all. Not in this field.

Senator LEAHY. So if there was an allegation made that this was a confirmation conversion in antitrust, you would say not—I do not mean to put words in your mouth, so please correct me if I am misstating your position—but, rather, that what Judge Bork has done is very carefully to say: if I do not think you have done it right, if I could find any way out of it, I am going to find that way?

Mr. PITOFSKY. I think that is a fair appraisal of the way he would go at implementing statutes.

May I illustrate by using the exchange that Senator Specter and Judge Bork engaged in last week?

Senator LEAHY. Please do.

Mr. PITOFSKY. I think it is very instructive.

Senator Specter was asking whether or not Judge Bork would enforce the Robinson-Patman Act. There was an exchange in which the Judge pointed out that many people think the Act is misguided. Senator Specter said, "I do not care. It is Congress' statute. Are you going to enforce it or are you not?" And he said, "Yes, I will. I have to."

But I cite in my testimony an earlier exchange—before these hearings began—on a very similar subject in which Judge Bork was being taxed with the question would he enforce the Robinson-Patman Act.

Senator LEAHY. I am sorry. I did not hear the last part. Would you enforce which Act?

Mr. PITOFSKY. The Robinson-Patman Act. The statute enacted in 1936 concerning price discrimination.

Senator LEAHY. I know. I just did not hear.

Mr. PITOFSKY. What he said then was a little different. It is consistent with his answer to Senator Specter, but the spin makes all the difference in the world.

What he said earlier was, "The Robinson-Patman Act says price discrimination which injures competition is illegal. My view of economics tells me price discrimination never injures competition, and therefore, I do not have to enforce the Act."

He went on to say, "I thought Congress winked when it passed that statute, and judges do not have to enforce winks."

Now, this is all the difference in the world in those two responses. The bottom line is that Judge Bork will not enforce the Robinson-Patman Act because he thinks price discrimination never injures competition. Many people believe that price discrimination does not injure competition nearly as much as we once thought, but very few people believe it never injures competition.

Senator LEAHY. Thank you.

General Abrams or Mr. Brown, do you have any different feelings on that than Dean Pitofsky?

Mr. ABRAMS. No. I subscribe to that, and I think there is so much in the record that indicates over a long period of time as to where Judge Bork is coming from.

It is interesting to note that Judge Bork derides some of the most eminent judges to ever sit on the Supreme Court. Yet he singles out one decision of a judge for very strong praise. That is interesting in the context of his otherwise strong criticism and condemnation, and he talks about a decision of Circuit Judge Taft in 1898 in the *Addyston Pipe* case. He calls that decision "one of the greatest, if not the greatest, antitrust opinion in the history of the law." Those were his words.

This is what Judge Bork said the judge did, Judge Taft did in that opinion, and I am quoting: "He chose his common law cases carefully and imposed upon them his own ideas. What emerged was not the restatement it pretended to be so much as a new structure, and he rejected in the guise of a discussion of common law cases Supreme Court Justice White's reasonable price standard as a sea of doubt."

So the greatest case for Judge Bork is one where a judge overrules in the guise of restatement in order to accomplish what he sees as the right end result. I think that is found as a common strain throughout Judge Bork's writing, throughout the literature, and has been pointed out not just about Judge Bork as scholar, but Judge Bork as judge in the written decisions that have come down. In both *Neumann* and *Rothery*, you see tangents. You see something that most judges will not do because it is not deemed to be appropriate for a judge to discuss things that are not relevant to the facts in a given case. He will seek to go out on these tangents to try to put his own thoughts into case law and case opinions.

Mr. BROWN. I think Professor Pitofsky and General Abrams said it better than I can.

Senator LEAHY. Thank you. Thank you very much, Mr. Chairman.

Senator GRASSLEY. Mr. Chairman, I have a unanimous consent request.

Senator DECONCINI. Can I have the request, please?

Senator GRASSLEY. I would like to insert after the colloquy I had with Senator Metzenbaum a paragraph from our hearings on Judge Bork when he was Professor Bork coming before our committee. I think this paragraph makes very clear that the standard that Senator Metzenbaum was setting for the Supreme Court also applies to the court of appeals.

Let me read just a short paragraph. He says this to Mr. Bork. "I am familiar with your views with respect to antitrust legislation, antitrust enforcement, and you and I are totally in disagreement on that subject. However, as I said at the time Justice O'Connor was up for confirmation, the fact that my views might differ from hers on any one of a number of different issues would not in any way affect my judgment as pertains to confirmation or failure to confirm a member of the judiciary."

So Senator Metzenbaum made the point that there was no difference between the Supreme Court and the court of appeals as far as he was concerned. I think what he said here 5 years ago makes clear, at least at that time, he had a different point of view, than today.

Senator DeConcini. Without objection, that will appear in the record as if read and whatever else is attached thereto.

[The information of Senator Grassley follows:]

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CONFIRMATION OF FEDERAL JUDGES

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

THE SELECTION AND CONFIRMATION OF FEDERAL JUDGES

JANUARY 27; FEBRUARY 12, 26; AND MARCH 11, 24, 31, 1982

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The second point I want to make is simply this, and that is the reason for the discharge. The point I have just made is why there was no harm to justice from the discharge. The reason for the discharge was that I had, I thought, to contain a very dangerous situation, one that threatened the viability of the Department of Justice and of other parts of the executive branch.

The President and Mr. Cox had gotten themselves, without my aid, into a position of confrontation. I have explained why the Attorney General and the Deputy Attorney General could not discharge Mr. Cox, and why my position was not the same as theirs because I had not made the representations and the assurances that they had, although I did make them to the people who came after Mr. Cox.

I was third in line in the Department of Justice, and the Acting Attorney Generalship came to me automatically by operation of Department regulation. I was not appointed Acting Attorney General; I became Acting Attorney General the moment those two gentlemen resigned. There was nobody after me in the line of succession, nobody. If I resigned, there was simply nobody who stepped into that position.

At that point, the President was committed because of this symbolic confrontation to discharging Mr. Cox. He would have appointed, I assume, an Acting Attorney General and he probably would have had to go outside the Department of Justice to do so. Perhaps one of the White House lawyers would have been appointed Acting Attorney General and would have discharged Mr. Cox. There was never any question that Mr. Cox, one way or another, was going to be discharged.

At that point you would have had massive resignations from the top levels of the Department of Justice. I talked to those people, the other Assistant Attorneys General and their deputies. If that had happened, the Department of Justice would have lost its top leadership, all of it, and would I think have effectively been crippled.

For that reason I acted, made the discharge, called the Department together, the leaders together, told them why I had done it, talked to a number of them in private. None of them left; they all stayed with me, stayed with the Department.

Therefore, that was my choice, Senator. On the one hand there was no threat to the investigations from the discharge and no threat to the processes of justice. On the other hand, I preserved an ongoing and effective Department of Justice. The only thing that weighed against doing what I did was personal fear of the consequences, and I could not let that, I think, control my decision.

Senator BAUCUS. I appreciate your answer. Obviously our country was going through very difficult times during that period. I thought we both had an obligation to discuss this because you are going to be sitting as a Federal judge There are some people who would like to know what happened, what you were thinking at the time, what your motives were, what the explanations were for your actions. I think your statement today helps explain all of that and I appreciate that statement very much.

In America, sometimes I think that perhaps public officials, perhaps members of this body, should resign on the basis of principle more often than we do. However, that is a side issue; it is not central to the point here under discussion today.

I wish you very well as you serve on the court.

Mr. BORK. Thank you, Senator.

The CHAIRMAN. The distinguished Senator from Ohio.

Senator METZENBAUM. Mr. Bork, it is a pleasure to see you here this afternoon. I am sorry if I am late.

I am familiar with your views with respect to antitrust legislation, antitrust enforcement, and you and I are totally in disagreement on that subject. However, as I said at the time Justice O'Connor was up for confirmation, the fact that my views might differ from hers on any one of a number of different issues would not in any way affect my judgment as pertains to confirmation or failure to confirm a member of the judiciary.

However, having said that, I have some concerns—and I think that Senator Thurmond has already addressed himself to some of those concerns. My concerns are not that your views might differ from mine but whether or not you would interpret the law on the basis of heretofore decided Supreme Court decisions.

Your entire book is a comprehensive attack on the current antitrust laws, and by your own admission these are the laws on the books as interpreted by the highest Court in the land. It was a great disappointment to me when Mr. Baxter appeared before our committee and indicated that notwithstanding that, he did not feel any obligation to enforce those laws. I think he was wrong.

I do not think you are in that position. You are not up for confirmation as an enforcement official. The concern that I have is whether or not you will be able to wholeheartedly apply the laws as previously interpreted by the Court, or are you going to start trimming them and cutting into them here and there to suit your own ideas, not of what is the law but what is good economic sense.

I guess I know even in asking the question that you have no alternative but to say, "No, I am not going to. I am going to follow the law," and yet I think it is appropriate that we put into the record your response.

Mr. BORK. I think so, Senator. I think my response has to be along the lines of the response I gave to the chairman about the problem of judicial activism. I have long been opposed to judges who write their own views into the law rather than what they think, on the basis of principled interpretation, the law is. I would be false to those views if I interpreted the antitrust laws in a way that I did not think the law really was or in a way contrary to the interpretation given to them by the Supreme Court.

I think that is true of any field of law. I assume, Senator, that in fields I have never written about and therefore nobody can really question me about, that I will often think that the law I am called upon to apply is not a terribly good law.

However, that is not my business as a judge. My business, particularly as a lower court judge, is to be obedient to the Supreme Court's interpretation of the law. Otherwise, our legal system falls into chaos. The Supreme Court cannot take enough cases every year to straighten out all of the lower court judges if they all began to interpret the law according to their own views rather than ac-

Senator DECONCINI. Is there anyone else? The Senator from Utah.

Senator HATCH. Maybe Senator Metzenbaum has changed his mind, like Judge Bork.

Senator LEAHY. Would it not be a little bit more fair to wait until Senator Metzenbaum has a chance to get back so he could respond?

Senator HATCH. I did not mean that as a crass comment. I am amazed that you would leap to make a fuss about it when I am just trying to make the point that people with good minds change them once in a while, including Senator Metzenbaum. Do not always read vile things into what I say, Senator.

I have to admit that there are a lot of vile things about these hearings that I feel have pervaded the hearings, and I will mention one of them in the next round that I get.

Mr. Abrams, how do other State Attorneys General feel about Judge Bork's views on antitrust?

Mr. ABRAMS. Well, I am here, as I said at the outset in my statement, Senator Hatch——

Senator HATCH. Well, answer my question. I know how you feel.

Mr. ABRAMS. I am here personally, and I am not here representing——

Senator HATCH. How do the other State Attorneys General feel?

Mr. ABRAMS. We have not done a head count, but I would suspect it is fair to say that there are a large number who oppose Judge Bork who have similar views to mine and there are some who would support him.

I can say this: That in terms of uniformity of antitrust policy and our approach to enforcement and to retention of strong antitrust principles in the law was expressed when State Attorneys General agreed on certain substantive standard. In one instance we adopted vertical restraint guidelines unanimously, and in another instance our merger guidelines were adopted with a few negative votes. But we came together in a bipartisan way to reinforce our commitment to the enforcement of antitrust laws.

Senator HATCH. Well, I think Judge Bork would do the same, feel very much the same.

I understand that you claim the support of all the State Attorneys General for so-called merger guidelines which were drafted largely by the New York Attorney General's office.

Mr. BROWN. Not quite all. There were two dissents.

Mr. ABRAMS. No. There were a couple of people who dissented—I think everybody voted for them except two States.

Senator HATCH. I have been led to believe there was as many as half the States Attorneys General did not actually vote for them. Am I wrong on that?

Mr. BROWN. Just the Attorney General of New Mexico and the Attorney General of your State, Senator Hatch, formally dissented from that vote.

Senator HATCH. Dean Pitofsky, you have been cited as supporting the view that the antitrust laws should be used as a leveler of wealth and political influence. Is that a fair characterization?

Mr. PITOFSKY. No, it certainly is not.

Senator HATCH. All right. Then I will not ask any other questions. I just wanted to know if that was fair, because Judge Bork's position, at least what he has said, is that the legitimate goal of American antitrust laws, of course, is the maximization of consumer welfare. I have to admit there are different points of view as to how you maximize consumer welfare, and his has been, I think, relatively widely accepted, certainly by 15 past section leaders, presidents of the ABA section on antitrust.

But be that as it may, I will not ask any further questions. Thank you, Mr. Chairman.

Senator DECONCINI. Thank you, Senator Hatch.

The Senator from Alabama, Senator Heflin.

Senator HEFLIN. Each of you in your analysis of Judge Bork's views on antitrust focused primarily on his book, and also his writings in the decisions of *Rothery* and *Neumann*. But since he has written his book, are there any additional writings or speeches that would give any indication of his thought as to whether they have changed from his book?

In other words, the area of speeches and writings as opposed to these two decisions.

Mr. PITOFSKY. Yes. Judge Bork has been a lively participant on the lecture trail. He has spoken frequently. My view is that he has not departed in any significant way from his lifetime of work in the antitrust field which culminated in this book. He wrote many articles before he wrote the book; he pulled them all together in the book; and so far as I can see, unlike his record in civil rights and constitutional law, he has not changed his mind.

Senator HEFLIN. I understand that all of you are concerned about what Judge Bork might do if confirmed, but what indications do you have that the Court as a whole would be willing to go along with Judge Bork's views in this area? Has the Court handed down any decisions within fairly recent times that would indicate that they appear to be wavering on any of the issues you have raised? For example, the per se illegality of resale price maintenance.

Has the Court or members of the Court indicated in their decisions matters that you would feel that they would be willing to go along with him?

Mr. BROWN. Well, Senator Heflin, the Court is certainly much more balanced than it was, say, in the Warren era where Justice Stewart said in a dissent the Government always wins. I think as a Supreme Court Justice, Justice Bork would go the other way and the other side would always win.

It is hard to make predictions about the Court, but he would be the one antitrust lawyer on the Court. Therefore, I think it is likely that he will play an authorship role quite frequently, as one that is not an expert on the Supreme Court. But that would be a guess of mine to think that if he could assemble anything near a majority or if it were plurality decisions where the Court were divided, he would likely play an authorship role simply because they would say, well, you are the person on this Court that knows antitrust law; why do you not take a swing at the opinion?

That is speculation from this one Attorney General.

Mr. PITOFSKY. Senator, Justice Powell was a moderate to conservative Justice on antitrust issues already. Therefore, substituting

Judge Bork for Justice Powell is not going to be a seat change. It would not be fair to argue that.

However, Judge Bork certainly is a more theoretical conservative than Justice Powell ever was, and in close cases I would think that he would make a difference on the Court.

Mr. **Abrams**. Senator, may I add another thought?

We know that any word, any phrase, any thought that is found in a Supreme Court opinion is given weight, is analyzed, is quoted, is cited; and we also know that Judge Bork, since coming on the bench in a couple of cases, in *Neumann* and *Rothery,* has been willing to go well beyond whatever were the defined issues in that case, whatever were the facts of that case to talk about other theories and issues that he has felt strongly about.

So I think one of the potential dangers is that, in writing opinions as a Justice of the Supreme Court, these attitudes and views which have been at variance with the will of Congress, with Supreme Court precedent, would be gratuitously inserted into opinions and would represent a danger for those of us who think that the Congress has been right in keeping this country in a certain direction in the antitrust area.

Senator **DeConcini**. Thank you, Senator Heflin.

Are there any other questions of the panel?

Senator **Thurmond**. I think that is all, Mr. Chairman.

Senator **DeConcini**. Thank you, gentlemen, very much for your testimony and the time that you took to be here today for this effort.

There is a vote on at this time, and we will return, let us see—the chairman will be returning after the vote. We will go ahead and proceed with the next witness, Ms. Beverly LaHaye of Concerned Women for America. If she would please step forward.

Ms. LaHaye, good morning and welcome. Would you raise your right hand?

Do you solemnly swear the testimony you are about to give today is the truth, the whole truth, and nothing but the truth, so help you God?

Ms. **LaHaye**. I do.

Senator **DeConcini**. Thank you.

Despite the time restraints, Ms. LaHaye, I am glad that you are able to testify. Will you please proceed for 5 minutes and then it will be opened to questions.

TESTIMONY OF BEVERLY LaHAYE

Ms. LAHAYE. Thank you. I thank you for the opportunity to speak for a large number of women in America.

As the president and founder of Concerned Women For America, one of the largest women's activist organizations, I appear before you to dispel the myth that mainstream American women fear the confirmation of Judge Robert Bork. Our concern is to ensure that the vocal minorities perpetuating this myth do not succeed in their deception that they speak for all women. The hundreds of thousands of citizens I represent here today include women from all walks of life and varying backgrounds. Liberal women have fought against four of the last five nominations to the Supreme Court, and they oppose Judge Bork for refusing to extend the Constitution to include their own biased agenda.

What the majority of American women value is equality under the law, the preservation of the family, and the establishment of laws which protect women in their uniqueness as women.

The women of today and of the future do not need a Justice who destroys the rights of Americans to create laws as they see fit. Judge Bork believes the law of the land should be made by men and women through their elected officials, guided by the Constitution. He consistently refuses to usurp the powers of the people. Instead, he correctly views the Court's role as the interpretor of the laws made by men and women. His only agenda is strict adherence to the separation of powers and preservation of the basic timeless values envisioned by our Founding Fathers. This is also Concerned Women For America's only agenda when evaluating a Supreme Court nominee. Unlike Judge Bork's opponents, we place no other litmus test before this or any other Supreme Court nominee.

Judge Bork's record and testimony before this committee demonstrates his belief that women are capable, first-class citizens deserving of equal protection under the law. As an educated judicial scholar, he adheres to the already established support structure necessary for women to determine their own destiny in the pursuit of any career they choose, excelling to the limits of their capabilities. He does not view women as a special interest group to whom he must cater. He views women and men as equal citizens under the law. Is this not what women have been striving for—to be treated as equals and not as frail creatures in need of a judge to grant them special privileges?

The most powerful right available to any American is the right to vote. Judge Bork believes that powers not given specifically to the courts by the Constitution are to be returned to the people and the States. He respects my right to voice my opinions on the issues, as a woman, and as an American, through the election of officials reflecting my values. With Judge Bork, all Americans can be certain their rights will remain intact.

We do not know how Judge Bork morally or emotionally feels about many controversial issues. His absolute belief in judicial restraint assures us that he will not attempt to force his personal or political philosophy on any of us.

Concerned Women For America is committed to working for Judge Bork's confirmation to the Supreme Court. We have collected over 76,000 petitions from across the country urging his confirmation. Last week, we held our fourth annual convention. Over 1,300 of CWA's leaders gathered to plan strategy on behalf of Judge Bork for the days remaining until the vote of confirmation. Just last Thursday, hundreds of women arrived in Washington to walk the halls of Congress and meet with their Senators, urging them to swiftly return our nation's highest Court to its full statute with the confirmation of President Reagan's sterling nominee, Judge Robert Bork.

Unlike the false claims made by some members of the Senate, what women of America fear most are those elected officials who wish to place unbridled power into the hands of judges they know will further their own personal political agendas. The women of America I represent place trust and confidence in Judge Robert Bork to leave politics to the politicians and power to the people.

A vote for Judge Bork is a vote for government by the people. As a citizen, I urge you on this committee to confirm Judge Bork to the U.S. Supreme Court. As a woman, I urge you to confirm him swiftly.

[Prepared statement follows:]

Testimony of Beverly LaHaye

President, Concerned Women for America

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Senator **DeConcini**. Ms. LaHaye, thank you very much for that testimony.

I am interested in the background. Is your organization, Concerned Women For America, a political organization, a professional organization, or an association of clubs or groups in different states? Can you give me just a little bit of information?

Ms. **LaHaye**. It is made up individuals who come together because of the agreement on certain issues and philosophies for America based on moral, social issues, the family.

Senator **DeConcini**. And it takes political positions, stances?

Ms. **LaHaye**. Yes.

Senator **DeConcini**. Just out of curiosity, did the Concerned Women For America take a position on the Equal Rights Amendment?

Ms. **LaHaye**. Yes, we did.

Senator **DeConcini**. And what was that position?

Ms. **LaHaye**. We were opposed to the Equal Rights Amendment as being part of our Constitution.

Senator **DeConcini**. And what about the Equal Equity for Pay Act that is pending? Has your organization looked at that legislation?

Ms. **LaHaye**. We believe in equal pay for equal work.

Senator **DeConcini**. You support the legislation, then, equal pay for equal work?

Ms. **LaHaye**. Yes, we do. We support equal pay for equal work, equal work defined as the same job, not comparable worth. We do not support any pay equity or comparable worth legislation—past, present or future.

Senator **DeConcini**. Thank you.

Your organization has reviewed Judge Bork's qualifications, obviously.

Ms. **LaHaye**. Yes, we have.

Senator **DeConcini**. Do you have a vote on him or do you have an executive committee? How do you come to the conclusion to take a position?

Ms. **LaHaye**. We have come to our conclusion—we have State leaders all across the United States. We have come together, and there has been no one who has opposed it.

Senator **DeConcini**. And did you take a position on Justices Scalia, O'Connor or Rehnquist or all of them?

Ms. **LaHaye**. We took a position on Scalia and Rehnquist.

Senator **DeConcini**. And O'Connor?

Ms. **LaHaye**. We were not really in the mainstream at that time.

Senator **DeConcini**. You mean you were not in existence?

Ms. **LaHaye**. We were in existence, but we were just really getting our States organized.

Senator **DeConcini**. The National Right-to-Life opposed O'Connor, testified in opposition to her. Did your organization have any feelings for her?

Ms. **LaHaye**. We made no statement one way or the other.

Senator **DeConcini**. Thank you. I have no other questions.

The Senator from New Hampshire.

Thank you very much, Ms. LaHaye. I am going to go vote, and the Chairman will be back shortly.

Senator HUMPHREY. Thank you, Mr. Chairman.

Ms. LaHaye, how many members are there in Concerned Women For America?

Ms. LAHAYE. The latest figure as of yesterday, 573,785.

Senator HUMPHREY. These are people who pay dues? Is that the idea?

Ms. LAHAYE. These are people who have been with us from varying points, either from our very beginning or they have come on at any time during the 9 years that we have been in existence. We do not drop them unless they request to be dropped.

Senator HUMPHREY. I think probably rather few Americans have heard of CWA, Concerned Women For America, and I think I know why. But before I express my thoughts on that subject, do you happen to know how many members are in the National Organization of Women?

Ms. LAHAYE. I am afraid I cannot answer that question.

Senator HUMPHREY. In any event, I have to say that organizations like NOW get far more play in the press and in the news media in general than do organizations like CWA. There is a certain media bias; one sees it over and over.

You know, in connection with that, I recall just a few days ago when retired Chief Justice Burger testified before this committee, providing eloquent testimony on behalf of the nominee—as did the same day a few hours later by Lloyd Cutler; I think it was the same day—do you know on which page in the Washington Post that story appeared? Page 3.

Now, here is a retired Supreme Court Chief Justice and, in addition, another individual who was President Carter's principal adviser in the area of law within the White House, the White House counsel, and that story appeared on page 3. It gives you some idea of the kind of skewing that the elite media are engaged in in this process. I think it is unfortunate. People ought to factor that in when making their personal judgments. I am not talking about Senators, but individual citizens might want to factor that in.

They probably have never heard of CWA, but they hear all of the time about NOW as though NOW were the only organization of women in the country, and, indeed, as though NOW represented every woman in the country. That is a misrepresentation, of course.

The issue that has been developed in these hearings which is of greatest concern to women, it would seem, is the privacy issue. All kinds of scary images have been conjured up by the opponents, whether deliberately or not, to the effect that there might be a government television camera in everyone's bedroom, if you listen to some of these people.

The fact of the matter is that the debate is not over whether there is protection of privacy in the Constitution; surely, there is explicit protection in the first amendment and fourth amendment and in many contexts.

The question at the heart of the debate is: Is there any limit on privacy? How broad is this right of privacy? Most of those who oppose Judge Bork believe that that privacy right is virtually unbounded; that, for example, the legislatures have no authority because of this unbounded right of privacy to make prostitution unlawful; that legislatures have no authority to make use of illicit drugs unlawful, provided that activity is carried out in private; or legislatures have no authority to regulate the creation and distribution and use of pornography.

And that is not just rhetoric on my part. Let me read from an article, or I should say an excerpt from a book written by one of the witnesses who appeared yesterday or the day before in opposition to Robert Bork, Professor Richards, from his book, "Sex, Drugs, Death and The Law."

He has this to say about drug use and the right to privacy: "Higher-order interests in freedom and rationality would identify respect for choices to use of drugs as an aspect of personal dignity that is worth protection under the constitutional right of privacy and call for its implementation by courts and legislatures."

In other words, he thinks the privacy right is so broad that legislatures have no authority and no business making illicit drug use unlawful.

If those who see and find and believe in an unbounded right to privacy were to prevail in this country and prostitution became perfectly lawful and the use of pornography perfectly lawful in every respect and drug abuse, what effect do you suppose that would have on the family?

Ms. LAHAYE. It would be devastating to the family, certainly. It would destroy the values, the moral values and the strength of every community in America, because you would no longer have controls over keeping the streets free and safe for children, for women. It would be a dreadful situation.

Senator HUMPHREY. Well, those who believe in an unbounded right of privacy, it seems to me, believe not in freedom but in license. That is not our system. We have a system of ordered liberty in which decisions, controversial decisions about which the Constitution does not clearly speak, either directly or by reasonable inference, such decisions are left to elected representatives of the people, legislators. Those who favor this broad, unbounded right to privacy would give, do give to judges authority that belongs to the people, to legislators, to persons who are accountable to the people. Judges, after all, are not accountable to the people. Once confirmed, they hold office for life, and that seems to me a very dangerous thing.

That is really what this whole debate is about. It is between those who think that judges ought to substitute their judgment in cases where the Constitution does not speak clearly, directly or by reasonable inference, and those who think that where the Constitution does not speak clearly we ought to leave it to the legislators to make decisions.

Am I not right in that analysis?

Ms. LAHAYE. That is right. And I think the whole discussion that we have been hearing is of grave concern to me, because we have got to remember that the laws are made by the people not by the courts.

Senator HUMPHREY. Yes.

Ms. LAHAYE. And we hear about all these attorneys that are so-called opposed to Bork. It is we the people who are America, we the people who get to state who is on the Supreme Court.

Senator HUMPHREY. Thank you.

Senator HATCH. Ms. LaHaye, I guess I will go ahead since nobody else is here. Welcome to the committee. We are very, very happy to have you here with us.

You know, over and over again during these hearings and the national advertising campaign against Judge Bork, we have heard how frightened women should be about this nomination. Two days ago, I mentioned the Lou Harris poll. I am really offended by that poll.

Let me spend a few minutes, because I think you will be, too. Overnight, that poll was given considerable attention on basically every network news show. The only thing we hear, however, is the conclusion: 57 percent would turn Bork down and only 29 percent of the American people would confirm him.

Now, we were told that that is what the American people believed should be done, but let us just take a look at that poll to see if it really supports that conclusion. Now, the poll sets out to be a model of fairness by giving two pro-Bork questions and two anti-Bork questions. Now, absolute fairness, it seems to me, would ensure that the subject does not have a skewed view when the final question is asked. That seems to be the only attempt at fairness in this poll, and from there on it is downhill fast.

Let us just read the first pro-Bork question. Remember, this is supposed to favor Judge Bork's position so that the subject will not receive a slanted view. It starts off, "Judge Bork seems to be well informed about the law." Already the poll begs the question of whether he is informed or only "seems to be." Some may think that is nitpicking, so let us just continue through the whole quote.

"Judge Bork seems to be well informed about the law, and such qualifications are worth more than where he stands on giving minorities equal treatment, protecting the privacy of individuals or other issues." It is an abominable question, and that is supposed to be pro-Bork.

For heaven's sake, in order to vote for Judge Bork on this question, you would have to be against equal treatment for minorities, women, protecting privacy and other issues of critical importance. The marvel is that Judge Bork only lost by two points on that particular question.

Now, if that was not so bad, let us look at the second pro-Bork question. And I might add, if you think this is bad, wait until we get to the anti-Bork questions that are clearly labeled like that in this questionnaire.

The second pro-Bork question is, "If President Reagan says that Judge Bork is totally qualified to be on the Supreme Court, then that is enough for me to favor the Senate confirming his nomination."

Now, that is a classic. The subject is asked to admit that the President does all their thinking for them, and I think that is an insult to the person being polled. And anybody who answers yes would have to be shameless. As strongly as I support Judge Bork, it is only after years of reading his opinions, knowing what he has done, reading his articles, knowing the man personally. I think if people could get to know him like that, there is no question it would be an overwhelming victory for him.

If these two pro-Bork questions were asked of the committee, I am sure that neither question would get a single vote. Nonetheless, 27 percent blindly followed the President and said yes to Question No. 2, the second pro-Bork question.

Now come the anti-Bork questions. We have finished the questions that were supposed to make you like the man. The first anti-Bork question, clearly labeled as such on the questionnaire, says, "Judge Bork has said, 'When a State passes a law prohibiting a married couple from using birth control devices in the privacy of their own home, there is nothing in the Constitution that says the Supreme Court should protect such married people's right to privacy.' " Now, that kind of a statement worries me. It has got to worry you. It has got to worry anybody who wants fairness in this process. This is not some two-bit high school political campaign for senior class.

This is the Supreme Court of the United States. What that does is that question evokes images of bedroom searches. If someone asks anyone in this room if they're worried about police raids in their bedrooms in the middle of the night, I think we could predict the answer on that.

By the way, I seriously doubt if this is a Bork quote that they cite it as because he repeatedly said that the Connecticut law was never used and never could be used to invade the privacy of the home. Nonetheless, the quote is attributed to Bork.

The amazing thing about that question and about the poll is that 27 percent say again that they are not worried by this quote. Now, we haven't finished yet. We still have the second anti-Bork question, and it's a beauty.

It says, quote, "Judge Bork seems to be too much of an extreme conservative, and if confirmed, he would do the country harm by allowing the Supreme Court to turn back the clock on rights for minorities, women, abortion and other areas of equal justice for all people," unquote.

Now, that's incredible. Just listen to the litany. He's too extreme. He'll do the country harm. He'll turn back the clock. He'll harm rights of minorities, harm women, abortion, and other areas of equal justice for all people.

Now, after that litany, if anyone would actually vote for Judge Bork, we wouldn't want him if that's the type of a truthful question that could be asked, you know, that you would expect. Actually it's totally slanted and totally a distortion, and it really bothers me. It's got me very upset to see this type of stuff, and it's garbage passed off too the American people on network news all over this country.

Now comes the big question. After the pro-Bork questions have slandered him and the anti-Bork questions have defamed, what's left to say? You know, it's quite a one-two punch. The big question is asked.

It starts this way, quote, "All in all," now, there's nothing too subtle here. They don't want you to miss the point. After they've called Bork a bedroom invading bigot, they want to make sure you remember it so they ask this.

Quote, "All in all, if you had to say, do you think the U.S. Senate should confirm or turn down the nomination of Judge Bork to be on the U.S. Supreme Court?", unquote.

Surprise. Surprise. The real surprise is that 29 percent actually voted to confirm the monster described in the poll. My only question is how Lou Harris can, with a straight face, announce that conclusion, quote, "Public opposes Bork 57 to 29," unquote.

The only thing that that poll shows or proves is that the public hates bedroom invading bigots, it seems to me. Now, that's not the art of polling. It is the art of character assassination, and that's what's going on here.

I think this is the worst of everything we've talked about through this whole hearing. It's not a political circus. This has become a freak sideshow because of things like that that are passed off as credible and passed off on network news and that bothers me a lot.

I might add, you know, it's something that I, you'd have to call a cheap political shot. I would call those who did that poll political gigolos. That's what I'd call them. That's how bad it is, and I'm disgusted with it, and I think that the network news shows ought to check behind the scenes behind their announcements and see if it's worthy of being broadcast.

His poll was so bad doing the same character assassination Justice Rehnquist when that happened that the major networks I don't even think even ran it. I was told by some of them that; they were so disgusted with the type of questions that were asked. Why didn't they look behind this one? Why didn't they look fcr these questions?

Look, I think anybody has a right to poll no matter what. That's one of the freedoms and rights we have, but nobody has a right to character assassination, and frankly, that's what's going on here, and this is just an illustration of it.

I want to ask one question but go ahead.

Senator HUMPHREY. Will the Senator yield for a question? Is the Senator making this poll available to the press?

Senator HATCH. Yes, I'll be happy to do that. We'll make it a part of the record. It's just a questionnaire form that I can make available, the one that was actually used by the people.

The CHAIRMAN. We'll make the whole questionnaire and the entire poll part of the record.

Senator HATCH. That would be fine, if you have the whole poll. I don't.

The CHAIRMAN. I don't, but I'm sure Mr. Harris would want to give to us now.

[The questionnaire follows:]

The Harris Survey

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PUBLIC OPPOSES BORK NOMINATION BY 59-27%

By Louis Harris

By a clear-cut 57-29 percent, the American people believe the U.S. Senate should turn down, not confirm, the nomination of Judge Robert Bork to the U.S. Supreme Court. While 14 percent are still undecided, nonetheless it now appears that a decisive majority have decided they would prefer Judge Bork not to become part of the high court.

These results, according to the latest Harris Survey of a cross section of 1,249 adults nationwide and taken by telephone between September 17th and 23rd, reflect public reaction to Bork's own testimony on the stand, and not the subsequent comments, pro and con, after he finished his appearance before the Senate Judiciary Committee. Significantly, among those who said they saw the hearings on TV or who followed them closely in the newspapers, a higher 61-32 percent majority oppose confirmation of Bork. Thus, the evidence is that the Judge did not help himself in his testimony.

Indeed, no more than 57 percent of the adult public say they have paid close attention to the Bork hearings. This is far below the 70 percent, for example, who saw or followed the Iran-Contra hearings when Lt. Col. Oliver North testified. Most curious is the fall-off of viewing of the Bork hearings among conservatives. Only 53 percent of all conservatives say they have followed the Judiciary Committee hearings, compared with 62 percent of moderates and 66 percent of liberals. This would indicate that many conservatives have not been pleased with some of the answers which Bork has given, such as his seeming contradiction of his previous stands critical of high court decisions in cases involving abortion, privacy, and other controversial cases.

Significant as well is the fact that when asked up or down whether Judge Bork should be confirmed, conservatives opt for confirmation, but only by a narrow 44-40 percent margin, compared with opposition among moderates by 61-30 percent and by liberals by a massive 79-13 percent. Among those who voted for Ronald Reagan in 1984, only a slender 45-42 percent plurality favor confirming Bork. A slightly higher 48-38 percent plurality among Republicans feel the same way. By contrast, independents are against Bork by 60-30 percent and Democrats by 70-16 percent.

In other key divisions, all regions of the country oppose Judge Bork's confirmation: the East by 56-29 percent, the Midwest by 60-29 percent, the South by 55-31 percent, and the West by 58-28 percent. Men oppose him by 55-36 percent, but women by a higher 59-23 percent. Whites oppose his confirmation by 55-31 percent, blacks by 71-15 percent, and Hispanics by 62-27 percent. The pattern by education is interesting: those with a post graduate degree oppose Bork by a close 47-45 percent, while those with a four year college degree oppose him by a wider 52-38 percent, and those with less than a high school education oppose him by 64-17 percent.

When some of the arguments which have been made about Bork -- pro and con -- are tested, it is evident immediately that his supporters have not made a strong case for him, while opponents have been more convincing to the public:

-- By 67-27 percent, a big majority of the public disagrees with the view that "if President Reagan says that Judge Bork is totally qualified to be on the Supreme Court, then that's enough for me to favor the Senate confirming his nomination." Normally, past surveys have shown that the people are inclined to go along with most nominees selected by a president. Indeed, in the case of the elevation of Justice William Rehnquist to the post of Chief Justice last year, a clear 57-39 percent majority expressed sympathy with the view that the President's choice should be backed up. This can be taken to mean that with public confidence in President Reagan reduced, the fact that he named Bork apparently carries less weight than before.

(over)

-- The claim of Judge Bork's backers that he is "well-informed about the law, and such qualifications are worth more than where he stands on giving minorities equal treatment, protecting the privacy of individuals, and other issues" meets with a narrow 43-41 percent rejection by the public. This indicates that Judge Bork perhaps did not impress the public viewing him as nearly as erudite and steeped in the law as his supporters have claimed. Those who viewed the hearings deny the claim that his legal literacy should count heavily by a higher 50-37 percent.

-- Most damaging to Bork is his statement early on that "when a state passes a law prohibiting a married couple from using birth control devices in the privacy of their own home, there is nothing in the Constitution that says the Supreme Court should protect such married people's right to privacy," which worries a 68-27 percent majority.

-- Also, even though much of his testimony vigorously denied it, a 47-41 percent plurality of the public goes along with the criticism that "Judge Bork seems to be too much of an extreme conservative, and, if confirmed, he would do the country harm by allowing the Supreme Court to turn back the clock on rights for minorities, women, abortion, and other areas of equal justice for all people."

Taken as a whole, it is evident that Judge Bork has not made a convincing case for his nomination to the high court.

TABLES

Between September 17th and 23rd, 1987, a national cross section of 1,249 adults was asked:

"As you know, the Senate is holding hearings on whether or not to confirm President Reagan's nomination of Judge Robert Bork to be a Justice on the U.S. Supreme Court. Have you seen or followed any of the hearings on TV and in the newspapers, or not?"

FOLLOWED BORK HEARINGS

	%
Seen or followed	57
Not seen or followed	42
Not sure	1

"Now let me read you some statements about the Bork nomination. For each, tel me if you agree or disagree."

STATEMENTS PRO AND CON ON BORK NOMINATION

	Agree %	Disagree %	Not sure %
PRO-BORK STATEMENTS			
Judge Bork seems to be well informed about the law, and such qualifications are worth more than where he stands on giving minorities equal treatment, protecting the privacy of individuals, or other issues	41	43	16
If President Reagan says that Judge Bork is totally qualified to be on the Supreme Court, then that's enough for me to favor the Senate confirming his nomination	27	67	6

(continued)

STATEMENTS PRO AND CON ON BORK NOMINATION (cont'd)

	Agree %	Disagree %	Not sure %
ANTI-BORK STATEMENTS			
Judge Bork has said, "when a state passes a law prohibiting a married couple from using birth control devices in the privacy of their own home, there is nothing in the Constitution that says the Supreme Court should protect such married people's right to privacy." That kind of statement worries me	68	27	5
Judge Bork seems to be too much of an extreme conservative, and, if confirmed, he would do the country harm by allowing the Supreme Court to turn back the clock on rights for minorities, women, abortion, and other areas of equal justice for all people	47	41	12

"All in all, if you had to say, do you think the U.S. Senate should confirm or turn down the nomination of Judge Robert Bork to be on the U.S. Supreme Court?"

CONFIRM OR TURN DOWN JUDGE BORK?

	%
Confirm	29
Turn down	57
Not sure	14

METHODOLOGY

This Harris Survey was conducted by telephone within the United States between September 17th and 23rd, 1987, among a cross section of 1249 adults nationwide. Figures for age, sex, race, and education were weighed where necessary to bring them into line with their actual proportions in the population.

In a sample of this size, one can say with 95 percent certainty that the results have a statistical precision of plus or minus three percentage points of what they would be if the entire adult population had been polled.

This statement conforms to the principles of disclosure of the National Council on Public Polls.

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Senator HATCH. Well, I would hope that he would, and I'm getting tired of that type of biased, one-sided, I think reprehensible polling in this country.

Ms. LAHAYE. Let me comment on that. That kind of polling, that kind of reporting has an adverse effect on our membership. We're offended by it, and it just makes us want to support Judge Bork all the more.

For example, the ads have been run repeatedly by People for the American Way so filled with distortions that it has actually turned our women on the other side because we also have been victims of distortion by People for the American Way.

So that doesn't affect us at all. It makes us more determined to support the Judge because of that kind of advertising.

Senator HATCH. I'll just make one other comment.

The CHAIRMAN. Senator, if you could conclude or you can take my 5 minutes.

Senator HATCH. I'll just conclude in about 30 seconds. Thank you, Mr. Chairman, for being so gracious.

But I'll just say this to you. When I was a young man I was a liberal Democrat, and my concept of liberalism was that you would be fair. You'd be decent. You'd be honorable, and that you had compassion and you felt deeply about other people and their rights.

That concept changed as I saw this type of stuff going on. I'm not saying that conservatives don't do things that are wrong, too. They do. But we're talking about a Supreme Court Justice position, and we're talking about one of the top judges in the world who has been on the second most important court in this land, who was found by the bar association all members to be exceptionally well qualified for that position 6 years ago, and who now is going through this character assassination for no good reason.

I think the American people need to know that, and it's reprehensible to have polls like this, it seems to me, passed off as reality, and you can see the whole scenario. The poll comes off, and one Senator or so stands up and says, "Well, I just can't vote for him," and you see that peel off.

Then somebody stands up and says, "Well, I got a vote count, and it's accurate, and there's no way he can make it." Of course, the American people start seeing it.

Then they have an actor who is known for compassion in his films and I think is a compassionate person personally who puts out an ad that people think must be true because he did it, and I think this type of stuff is all geared to, I think, make a political circus out of what really is one of the most important confirmation decisions in the history of the country.

Thank you, Mr. Chairman. I appreciate the time.

The CHAIRMAN. Thank you, Senator, and thank you, Madame President. We have more questions for you but I'd just note that compassionate actors have been very successful in the past.

Senator HATCH. Yes, I agree with that. I just like them to be truthful.

The CHAIRMAN. That's right.

The Senator from South Carolina, and then I will move to the Senator from New Hampshire.

Senator HUMPHREY. I already had a round.

The **Chairman**. All right. Thank you.

Senator **Thurmond**. Ms. LaHaye, we are very pleased to have you here. I believe your organization represents a lot of women. How many members do you have?

Ms. **LaHaye**. Our membership as of yesterday's count was 573,785.

Senator **Thurmond**. 573,785.

Ms. **LaHaye**. And they're in all 50 States and Puerto Rico.

Senator **Thurmond**. All 50 States. Well, you have a very significant membership. Now, we have heard statements here at these hearings that the women are opposed to Judge Bork and they're afraid of Judge Bork. Is that a fringe group that takes that position or is that the thinking of the women generally in the United States?

Ms. **LaHaye**. Absolutely not. I think I represent the mainstream of American women, and we do support Judge Bork. I think probably some of that stemmed right from this committee when a member of your Judiciary Committee said that he heard that American women were afraid of the Judge, and we are here to speak on the opposition of that.

Our women are not afraid of him. By his own testimony and his own background, we feel that his record would give women all that we're looking for in the Supreme Court decisions, and we were here to support Justice Scalia. We were here speaking for him and noted that this committee supported him 100 percent.

Then our question is if Justice Scalia and Judge Bork voted together 98 percent of the time, why are we in such controversy over this appointment?

Senator **Thurmond**. So the women of your organization favor Judge Bork?

Ms. **LaHaye**. Yes, we do, sir.

Senator **Thurmond**. Do you feel he will make a fair and reasonable judge and will be fair to women?

Ms. **LaHaye**. Yes, we certainly do.

Senator **Thurmond**. Do you feel he will be fair to blacks and to other groups?

Ms. **LaHaye**. Yes, we do.

Senator **Thurmond**. I just want to ask you this question. Do you feel from your knowledge and your study of Judge Bork's reputation and his service on the circuit bench where he's handed down 150 decision himself and has participated in over 400 decisions, none have been overruled by the Supreme Court, that you feel that Judge Bork is in the mainstream and should be confirmed by the Senate?

Ms. **LaHaye**. We believe he's in the mainstream and should definitely be confirmed by the Senate.

Senator **Thurmond**. The American Bar Association considers several qualifications—integrity, judicial temperament, and professional competence. Do you feel that he possesses those qualities as well as being a courageous man, a conscientious man, and imaginative man, and would be an addition to the Supreme Court?

Ms. **LaHaye**. I'm happy to say yes to all those. Absolutely.

Senator **Thurmond**. Thank you very much.

The CHAIRMAN. Madame President, I want to thank you very much for coming. You do represent a large group of women, and your point of view is important that we hear it.

Let me ask you only one question if I may. Two other very strong and articulate supporters of Judge Bork, both witnesses before this committee, Mr. Lloyd Culter, former Democratic advisor to President Carter—I believe officially counsel to President Carter if I'm not mistaken—and a distinguished former cabinet member, Carla Hills in a previous administration, have both testified here that they believe that Judge Bork—Judge Bork did not say this, but that they believe that Judge Bork would probably vote to uphold *Roe* v. *Wade,* to support the pro-abortion decision before the Supreme Court.

What is your view? Do you think Judge Bork would uphold the pro-abortion, as it is characterized, in the Supreme Court?

Ms. LAHAYE. Senator Biden, in my testimony, which I believe you had not been here——

The CHAIRMAN. I apologize. I was on the floor. I'm sorry.

Ms. LAHAYE. I understand.

We mentioned that we don't really know how he would vote on some of those issues. We do not know, but we do know that we support him because of his judicial restraint, and that is so important to us and the fairness that we see that he's exemplified that we're willing to take that chance and just vote for Judge Bork to support him.

The CHAIRMAN. You think there is a possibility he could vote for *Roe* v. *Wade*?

Ms. LAHAYE. I cannot even speculate how he would vote on that.

The CHAIRMAN. Fair enough. I appreciate your testimony. You were very nice to come. It's important that you be here.

Senator HATCH. Senator Hatch, I have one more question and I would like to put something in the record.

Ms. LaHaye, the largest single category of cases on the Supreme Court's docket happen to be criminal cases. Does your organization have any feelings about Judge Bork's approach to law enforcement and whether or not he should be on the Court for that reason?

Ms. LAHAYE. Well, we feel very strongly that we are at the point where the criminal is not supposed to be the primary issue. It should be those who have been offended, and the recognition should be given to support their rights and benefit them, not the criminal.

We feel in judicial restraint that would be represented very definitely.

Senator HATCH. Thank you very much.

Mr. Chairman, could I put something in the record?

The CHAIRMAN. Sure. What are you going to put in?

Senator HATCH. Well, it's going to be a response to the statement of John Frank the other day, because a few days ago an attorney testified on Judge Bork's judicial record. At that time, Senator Simpson noted, with some surprise, that one of Judge Bork's opponents had finally looked at his entire record on the circuit court, and his conclusion against Judge Bork prompted us to take a closer look at that actual record and his testimony.

In many respects, his analysis was found wanting by us. For instance, this witness, John Frank, referred to a concurrence as a dissent and to a dissent as a concurrence or to Bork's opinion has having been written by another judge, and beyond errors of fact such as that, however, are other misleading aspects of the analysis.

One example of the attorney's faulty analysis was his assertion that the *Lebron* case where Judge Bork allowed a litigant to ridicule President Reagan in subway ads was the most restrictive, he said, the most restrictive speech opinion since 1930, and he went on to say that Bork's conclusion was, quote, "obvious", unquote.

Now, two points. Judge Bork's opinion cannot be both the most restrictive of free speech since 1930 and, quote, "obvious". Moreover, if this case was so obvious, why did the district court rule against Lebron as it did.

So I would ask, Mr. Chairman, that my analysis, Response to the Statement of John B. Frank, be placed in the record at this point.

The CHAIRMAN. Without objection. We'll send a copy of that to Mr. Frank and give him an opportunity to respond.

Senator HATCH. That would be fine.

[The information of Senator Hatch follows:]

Response to the Statement of John P. Frank

Introduction

Witnesses both for and against Robert Bork have agreed on one salient issue: as a Judge of the U.S. Court of Appeals for the District of Columbia, he has judged well and wisely, compiling an outstanding record. William Coleman stated the consensus when he testified that Judge Bork's judicial opinions "are good opinions." Indeed, only a single witness has significantly questioned that view. Appearing before the Committee on September 23, John P. Frank submitted a prepared statement criticizing a select few of Judge Bork's opinions for the court. His analysis of the 20 cases discussed (out of Judge Bork's 117 majority opinions) is seriously misleading.

Examination of Judge Bork's judicial record is of course essential to this confirmation process. What is not appropriate, however, is to distort the record by referring, for example, to a concurrence by Judge Wald as a dissent (as in Mr. Frank's discussion of Rothery), by referring to a dissent from a denial of rehearing as a statement of those in concurrence with the case's holding (as in Mr. Frank's discussion of Dronenburg), or by referring to words written by Judge Bork as having been written by Judge Wright in dissent (as in Mr. Frank's discussion of Singleton). These misstatements may stem simply from a failure to read the cases accurately, but they all seem to cut in the same direction -- against Judge Bork.

It is even less appropriate to present Judge Bork's Crowley concurrence as standing for the precise opposite of what it in fact said, to present Lebron as damaging to free speech, to label a pure administrative law case a "discrimination" case (as in the discussion of Black Citizens for a Fair Media v. FCC), to state only partially the holdings of Carter and of various other cases, or otherwise to describe cases in the misleading fashion outlined in the following discussion that tracks the organization of Mr. Frank's prepared statement.

"Activism"

1. Crowley v. Schultz

Mr. Frank begins his attack by asserting that "Bork is a judicial activist beyond anything Earl Warren ever dreamed of." In support of this proposition he first cites Crowley v. Shultz, 704 F.2d 1269 (1983). There, Judge Bork joined with Judges Wright and Edwards in holding that a statutory savings clause precluded the award of attorneys fees being claimed under the Back Pay Act. Mr. Frank does not question this result, but writes that Judge Bork then "proceeded to write a separate opinion ...declaring that even without the savings clause, the employees would not have been entitled to the [fees]. In short, he was so anxious to make law on this subject that he proceeded to decide a case and write an opinion on a matter which nobody had presented to him."

In fact, Judge Bork wrote separately not to "make law" or "decide" an extraneous issue, but - quite the opposite - to preserve for future cases an issue it had not been necessary to reach. The Judge observed that "[i]n reaching this holding, we assume that, absent the Savings Clause, the Back Pay Act applies to cases such as this .... [That] issue has not yet been briefed and argued." 704 F.2d at 1275, 1276 (emphasis added). Demonstrating how careful and restrained a jurist he is, Judge Bork took the effort to make clear that "it is impossible confidently to say how we would have decided this issue [of the Act's applicability] had there been briefing and argument," thus specifically noting that the issue Mr. Frank now accuses him of deciding had not been resolved. 704 F.2d at 1276. Far from "declaring" whether fees could be awarded in the absence of the savings clause, Judge Bork simply made plain that that question was for another day. It is hard to imagine how his position in the case could have been more greatly distorted.

2. McIwain v. Hayes

The next two cases cited by Mr. Frank as examples of unprecedented judicial activism have both been thoroughly discussed in the essay prepared by Richard Stewart, Harvard Law

School's noted administrative law expert. Mr. Frank writes of McIlwain v. Hayes, 690 F.2d 1041 (1982): "[u]nder the Bork opinion, despite a very clear statute, the general public will continue to eat red dye No. 9." The opinion, Mr. Frank concludes, "nullifies an important act of Congress" requiring various color additives to be withdrawn from the market if not proven harmless within a two and a half year period. Professor Stewart, however, tells us (as Mr. Frank does not) that the relevant statute allows such time beyond the thirty month period as the Food and Drug Administration "from time to time" finds "necessary to carry out" the testing. Congress specified no absolute time limit for the process. Here, the additives had continually passed all tests, but the FDA repeatedly insisted that before gaining final clearance, they be subjected to the even more sophisticated tests made possible by scientific advances. Professor Stewart's summary is perhaps more enlightening, albeit less flamboyant, than Mr. Frank's: "On these facts, Judge Bork found that the successive FDA postponements fell squarely within the language of the statutory provision authorizing such postponements .... Judge Bork's opinion is well reasoned and the result is clearly correct. The only alternative would be to ban long-established color additives that had passed every safety test to which they had been subjected, a result plainly contrary to the statutory scheme."

3. Jersey Central

The Jersey Central Power & Light Co. v. FERC case, 810 F.2d 1168 (1987)(en banc), to which Mr. Frank devotes a paragraph is fully discussed through six pages of Professor Stewart's essay. Suffice it here to say that Mr. Frank is again simply wrong when he asserts that Judge Bork's majority opinion "shifts all risk of loss to the consumer, a striking case of judicial activism" under which "[t]he result is that consumers take it in the pocketbook." As Senator Simpson informed Mr. Frank, not one dime has been shifted from the consumers. The en banc opinion did require the Federal Energy Regulatory Commission (FERC) "to hold a hearing on Jersey Central's claim that FERC's refusal to allow it increased rate revenues would be confiscatory, violating its statutory and constitutional rights," to quote Professor Stewart. That hearing has not yet even been held; when it is, its results will presumably be subject to court review. The opinion of the D.C. Circuit requiring a fair hearing "is entirely consistent with precedent and represents a reasoned and reasonable resolution of a difficult case," Professor Stewart concludes.

4. Rothery Storage

Mr. Frank then asserts that Judge Bork's "nonjudicial pronouncements" show that he "wants to write the Sherman Act out of existence." No citations are provided to support this remarkable proposition. This calumny has been emphatically disproven by any number of antitrust experts, including fifteen past Chairmen of the Antitrust Law Section of the American Bar Association (who have written to note that "the mainstream view, which no one has helped promote more than Judge Bork, is that the proper antitrust policy is one which encourages strong private and government action to promote consumer welfare," and who note that the Judge's classic book on antitrust has been cited by the Supreme Court and the Circuit Courts of Appeals in 75 separate decisions--one or another of which has been joined by every present member of the Supreme Court).

Mr. Frank discusses only one of Judge Bork's antitrust decisions, Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210 (1986). He seeks to discredit the opinion by citing "Judge Wald's dissent." In fact, however, Judge Wald agreed with Judge Bork's holding, writing: "I concur in the result and in much of the reasoning of the panel's opinion." 792 F.2d at 230 (Judge Wald concurring). Indeed, another distinguished "liberal" Judge appointed by President Carter, Judge Ginsburg, joined with Judge Bork in the opinion. Their holding affirmed the judgment of the District Court that Atlas Van Lines, to protect the use of its equipment, facilities, services, and reputation, could legally require its agents to transfer their other, independent interstate business to separate corporations (thereby eliminating a problem of "free riding"). While the requirement advanced consumer welfare by preserving the services that the nationwide line was able to offer its customers, it posed no threat of decreasing output or raising rates, for firms other than Atlas controlled fully 94 percent of the relevant market. Thus, Mr. Frank's analogy to the original Standard Oil monopoly comes as a mystifying non sequitur in this discussion of a firm with less than a six percent market share. Confusing, too, is Mr. Frank's classification of the holding reached by all four judges involved as "judicial activism." Not only did the court look to recent congressional action on the subject (citing statutory provisions and Senate Committee report language that "this type of relationship is not a violation of the antitrust laws and is standard agency law"), its result was also dictated by three recent Supreme Court opinions: Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S.1 (1979); National Collegiate Athletic Association v. Board of Regents, 468 U.S. 85 (1984); Northern Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 105 S. Ct. 2613 (1985).

5. Lebron

Even Mr. Frank's ideosynonatic reading of the cases cited above does not prepare one for his astonishing assertion that Lebron v. Washington Metropolitan Area Transit Authority, 749 F.2d 893 (1984), is one of "the most restrictive free speech opinions in any court since 1930." There, Judge Bork upheld the right of an artist to display in the Washington, D.C. subway posters highly critical of President Reagan and depicting the President as mocking the poor and downtrodden. The subway had banned the depiction as factually deceptive. Mr. Frank dismisses Judge Bork's holding, saying, "[p]resumably any court in the land would have come to this fairly obvious conclusion." Actually, Mr. Frank would not have had to stretch his imagination too far to contemplate a court upholding the Transit Authority's ruling, for that is precisely what the district court judge who heard the case did. While Mr. Frank leads us to believe otherwise, Judge Bork's opinion supporting the artist's free speech right overturned the lower court's judgment.

Mr. Frank's main disagreement with Lebron, however, is not that the result was "obvious", but that Judge Bork's opinion assertedly "knock[s] ...in the head" the rule disapproving of prior restraints on speech. Again, the characterization is absolutely false. While recognizing that the Supreme Court has held that not all prior restraints are per se unconstitutional, Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975); Members of the City Council of Los Angeles v. Taxpayers for Vincent, 104 S.Ct. 2118 (1984), Judge Bork proclaimed that prior restraints do bear "a presumption of unconstitutionality." 749 F.2d at 896.

Indeed, Judge Bork went even further. He could have based his decision (as Judge Starr would have done, 749 F.2d at 898) on the reasoning that the poster was not "deceptive" because no reasonable person would think it to represent an actual event. He went beyond that rationale, however, to hold that "a scheme that empowers agencies of a political branch of government to impose prior restraint upon a political message because of its falsity is unconstitutional." 749 F.2d at 898. Judge Bork noted in passing that "in extreme situations prior judicial restraint on the basis of falsity may be appropriate," 749 F.2d at 898, and gave a specific example of such a possible instance (citing a case where a federal court had prohibited an advertiser from falsely implying that his ads spoke for and represented the views of the Republican Party). Judge Bork's nonpartisan opinion, overruling the district court and going beyond the rationale favored by Judge Starr, is tremendously protective of First Amendment rights, and is far more protective than the Supreme Court has been in other contexts involving restraint of political speech. See, e.g., Lehman v. City of Shaker Heights, 418 U.S. 298 (1974)(upholding a ban on all political advertising in the city's subways). It is also more protective against prior restraint than is Mr. Frank later in his statement, where he attacks Judge Bork's opinion in the Williamson Tobacco case for rejecting an order "requiring prior FTC approval of certain advertising as to truth or content."

6. Dronenburg

As his final proof that Judge Bork is a judicial activist, Mr. Frank offers Dronenburg v. Zech, 741 F.2d 1388 (1984). Mr. Frank, unlike other of Judge Bork's opponents, does not dispute the result in that case: "[t]he issue there was whether the Navy could exclude homosexuals, and the answer is an obvious yes." Rather, Mr. Frank attacks Judge Bork for setting out his rationale in a "wholly gratuitous discourse" that Mr. Frank asserts drew criticism from "concurring judges." While Mr. Frank would have us believe that Judge Bork was rebuked by colleagues who voted in agreement with Dronenburg's holding, the fact is that there were no concurrences. Judge Bork wrote for a united panel that included Judge Scalia. The criticism to which Mr. Frank refers actually came from four other judges who were on the losing side of a full court decision not to rehear the case.

Just as Mr. Frank neglects to tell the Committee that Judge Bork's opinion was left standing by the full court, so does he fail to cite Judge Bork's statement in response to the dissents from the denial of rehearing. As Judge Bork wrote, his panel opinion was necessarily thorough because "[t]he appellant cited a series of cases...which he claimed established a privacy right to engage in homosexual conduct. It was, therefore, essential that the panel examine those decisions to determine whether they did enunciate a principle so broad." Dronenburg v. Zech, 746 F.2d 1579, 1582 (1984)(denial of rehearing)(statement of Judges Bork and Scalia). Nor, of course, does Mr. Frank inform his readers of Judge Ruth Bader Ginsburg's comments in voting not to reconsider Judge Bork's opinion, see 746 F.2d at 1581 (statement of Judge Ginsburg). Nor does he reveal Judge Starr's view. See 746 F.2d at 1584 (statement of Judge Starr)("the panel's moving ... to examine more broadly the Supreme Court's teachings on the right of privacy ... seems not only appropriate but necessary to treat dispassionately and fairly the constitutional claims advanced by Mr. Dronenburg").

"Minorities"

Mr. Frank next proceeds to contend that in opinions written by Judge Bork "involving minorities, ... one way or another, the minorities regularly and routinely lose." As proof of this broad and serious assertion, Mr. Frank begins not with substantive civil rights cases, but with a trilogy of Federal Communications Commission administrative law issues. Indeed, he never even refers to cases such as Laffey v. Northwest Airlines, 740 F.2d 1071 (1984)(where Judge Bork wrote or joined a per curiam opinion that women airline stewardesses may not be paid less than their differently titled male counterparts), or Emory v. Secretary of the Navy, slip op. 85-5685 (May 19, 1987)(reinstating a lawsuit alleging civil rights violations involving the selection of military officers subject to Senate confirmation), or Sumter County v. United States, 555 F.Supp 694 (D.C. 1983)(where Judge Bork sat on the District Court to write or join the per curiam opinion holding that the county had failed to demonstrate that its new voting system had neither the purpose nor the effect of "abridging the right of black South Carolinians to vote"). Nor does Mr. Frank reference or dispute the earlier testimony of Mr. Born that "Bork has voted for one or more civil rights claims in seven out of the nine decisions he had rendered involving substantive interpretations of civil rights laws protecting minorities or women."

1. National Latino Media Coalition

Rather than discuss such substantive civil rights claims, Mr. Frank turns to National Latino Media Coalition v. FCC, 816 F.2d 785 (1987). As with the other FCC cases that follow, Mr. Frank does not directly dispute the holding or the rationale of the case; he simply notes that the less appealing party won. This case involved an FCC announcement that in the event that regular proceedings for awarding broadcast licenses ever ended in a tie, a lottery system could be employed. The unanimous D.C. Circuit panel found that this announcement was not a legislative rule making, but was merely an interpretive expression of the agency's understanding of its governing statute. Under the Administrative Procedure Act, "notice and comment" requirements do not apply to such interpretive statements. Thus, the Act "disposes of petitioners' contention that the statements could not be made without notice and comment." 816 F.2d at 789. This holding, it should be noted, gives the lie to Mr. Frank's assertion that the court "refused to decide the case." It is true that the court, bound by Abbott Laboratories, 387 U.S. 136 (1967), and by Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967), was precluded from reviewing certain other issues because the FCC's interpretive, hypothetical statement did not bind the Commission or "presently affect the rights and obligations of any license applicant or of anyone else." 816 F.2d at 789. That holding, too, is completely unexceptionable, and Mr. Frank does not contest it.

2. Black Citizens for a Fair Media

He turns next to Black Citizens for a Fair Media v. FCC, 719 F.2d 407 (1983), where again his only objection seems to be that the party with the better name had the losing legal argument. Mr. Frank's entire discussion of the case reads: "Judge Bork also rejected a challenge by a black group that the FCC's broadcast renewal application procedures were discriminatory." That sentence misstates the case. No claim of discrimination was made. The case, steming from the FCC's adoption of simplified license renewal procedures with less onerous paperwork, involved two issues of administrative law: one administrative law claim was made under the Communications Act, while the other was brought under the Administrative Procedure Act. Race and discrimination were simply not involved. Judge Bork's administrative law ruling seems clear cut; as Professor Stewart testified, "Judge Bork's position is amply supported by other recent decisions in the D.C. Circuit and the Supreme Court."

3. ICBC

The third in Mr. Frank's series of non-civil rights "civil rights" cases involving the FCC is ICBC Corp. v. FCC, 716

F.2d 926 (1983). There, Judge Bork wrote for a unanimous panel; he was joined by Judge Wald and Judge Scalia. The FCC had refused to make an unprecedented exception to a rule "designed to prevent interference among AM radio stations." 716 F.2d at 926. Because AM frequencies carry much farther at night than in the day, the FCC found that it could not waive its rules to allow night operation of the daytime station WLIB: night broadcast would have caused extensive interference with other, previously established stations. The court held, reasonably enough, that the FCC decision not to waive its rule where interference would result was not arbitrary and capricious. Mr. Frank does not explain why this holding was wrong.

4. Carter v. D.C.

After these FCC cases, Mr. Frank raises Carter v. District of Columbia, 795 F.2d 116 (1986). Both sides in that case had appealed to the D.C. Circuit, and the opinion filed jointly by Judge Ruth Bader Ginsburg and Judge Bork contained directions to the district court that variously benefited each side. Mr. Frank is correct in noting that the panel held, consistent with the Supreme Court's precedent in Monell v. Department of Social Services, 436 U.S. 658 (1978), that to establish § 1983 municipal liability for the police misconduct alleged, it was the plaintiff's burden to show that the misconduct resulted from a "persistent, pervasive practice of [D.C.] city officials and Police Chief Turner, which . . . was so common and settled as to be considered [a custom or policy]." 795 F.2d at 125. It is hard to discern how a decision, based on the facts presented, that the city government of Washington, D.C. and Police Chief Maurice Turner did not have such a policy is somehow anti-minority.

Mr. Frank omits reference to the rest of Judge Ginsburg's and Judge Bork's opinion. Contrary to the impression left by Mr. Frank's unelaborated statement that the panel "approved a directed verdict against the plaintiffs," the plaintiffs retained their cause of action against the police officers involved. Denying the arguments of the defendants, Judges Bork and Ginsburg held:

> Plaintiffs are entitled to the judgment of a jury on the quality of the officers' conduct. And a reasonable jury, crediting plaintiffs' account of the episode in suit, could well find that Officers Markovich and Tarantella, in arresting and thereafter filing charges against Carter and Parker, acted egregiously, intentionally, or recklessly to cause plaintiffs severe emotional distress.

795 F.2d at 139. The Judges further held that were the plaintiffs to prove the police misconduct at their new trial, the District Court (contrary to its initial decision on the matter) should have the plaintiffs' arrest records expunged. The Judges' compassion for the plaintiffs was clear: "We discern no cogent reason, should plaintiffs prevail at trial, for refusing to relieve them of the stigma of responding 'Yes' to the question, 'Ever arrested?'." 795 F.2d at 136. A more complete account of the case than Mr. Frank provides, therefore, hardly demonstrates that Judges Ginsburg and Bork are determined that "minorities regularly and routinely lose."

5. Haitian Refugee Center

Mr. Frank attacks, as "another way to skin the cat," Judge Bork's holding for the court in Haitian Refugee Center v. Gracey, 809 F.2d 794 (1987), that the plaintiffs lacked standing to sue. He fails to explain why even a devious and biased judge would need any subterfuge in this case where, as Judge Edwards (a Democratic appointee) pointed out, if plaintiffs were found to have standing, they still had "no support in the cited laws or in the Constitution of the United States." See 809 F.2d at 8208 (statement of Judge Edwards, concurring in part and dissenting in part).

"Nuclear Safety"

1. Bellotti

Mr. Frank then turns to the topic of "nuclear safety," a goal toward which, we are told, "Judge Bork is not inclined to extend himself much." In Bellotti v. NRC, 725 F.2d 1380 (1983), therefore, Mr. Frank argues, the doctrine of standing provided

Judge Bork with a "handy tool" (presumably with which to work for increased danger from nuclear annihilation). To other readers, the case may seem somewhat less sinister. Bellotti centered on whether the Massachusetts Attorney General could intervene to change the agenda in a Nuclear Regulatory Commission proceeding. The scheduled proceeding was to involve NRC plans to fine and to tighten safety regulations on Boston Edison; the Massachusetts officeholder sought to interject additional issues. The court held that because Mr. Bellotti did not oppose the penalties and increased regulations to be addressed by the proceeding, but rather sought imposition of other measures, he was not entitled to intervene. That result is strongly supported by the analysis of the Supreme Court in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978); see also, testimony of Professor Stewart.

2. San Luis Obispo

Judge Bork's holdings in San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26 (1986)(en banc), were joined by Judges Mikva, Edwards, Scalia, and Starr. Following Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), the court held that without evidence of bad faith, it was not free to demand production of the transcripts of closed administrative meetings. The court also held that where the Commission had reviewed a plant's design and found it "more than adequate to withstand the forces of a Safe Shutdown Earthquake without releasing dangerous quantities of radioactivity," where the chances of a greater earthquake were rated at zero, and where the possibility of an earthquake coupled with an unrelated radiological accident was found to be "one in several tens of millions," the Commission was not required to hold the hearing sought by the petitioners. 789 F.2d at 38, 33, 2. As Professor Stewart has noted: "Judge Bork would accord rather more deference to the fact findings and policy judgments of the Commission than would Chief Judge Wald. In this he has the support of the

Supreme Court, which in Baltimore Gas and Electric Co. v. NRDC, 462 U.S. 87 (1983), rejected an analogous challenge to NRC determinations." It had not been suggested prior to Mr. Frank's testimony that Judges Mikva and Edwards, for example, somehow oppose "nuclear safety."

"Communication and Speech"

Mr. Frank's next assault follows in a strangely truncated section on "communication and speech." Again, Judge Bork's Ollman concurrence is not even mentioned, although it is widely regarded as the most important legal development favorable to the press in a decade and as a vivid example of how the Judge preserves the constant First Amendment value of freedom of speech against ever changing circumstances (in this instance, the growing dangers posed by burgeoning libel actions). Two of Judge Bork's other important opinions vindicating free speech rights (Lebron and Williamson Tobacco) are split off for separate analysis (and attack) so that their powerful First Amendment discussions are not included in this First Amendment section. Rather, Mr. Frank here seizes upon just three cases, and criticizes Judge Bork for giving too much weight to First Amendment values in two of them.

1. Finzer v. Barry

Before excoriating Judge Bork for being overly protective of free speech in TRAC v. FCC and Loveday v. FCC, Mr. Frank criticizes him for allowing the restrictions at issue in Finzer v. Barry, 798 F.2d 1450 (1986), cert. granted ____ U.S. ____ (1987). There, Judge Bork reexamined and affirmed the continued validity of D.C. Circuit precedent in ruling for Washington, D.C. Mayor Marion Barry and against David Finzer, the National Chairman of the Young Conservative Alliance of America. Mr. Finzer sought to carry signs denigrating the Soviet and Nicaraguan governments in violation of a statute making it unlawful to "display any ... placard ... designed ... to ... bring into odium any foreign government" within 500 feet of that country's embassy. The Finzer majority upheld the statute after lengthy analysis.

This case demonstrates the tactical advantage owned by a judge's opponents, who can find reasons for criticism whichever way a case is decided. Had Judge Bork voted for Mr. Finzer, it is hard to believe that certain critics of this nomination would not have branded that result as "activist" and as motivated by sympathy for a conservative loyalist and by antipathy toward the communist regimes whose embassies the law protected. Judge Bork would have been taken to task for ignoring the international law and treaty obligations that he in fact obeyed, and for promoting his foreign policy views over those of Congress, the State Department, and the officials of Washington, D.C. Instead, the Judge looked to centuries old principles of the Law of Nations, which he observed were codified, for example, in Article 22 of the Vienna Convention (among the signers of which is the United States). That treaty lists the obligations of a host state with regard to foreign missions, and specifies: "The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission ... and to prevent any disturbance of the peace of the mission or impairment of its dignity." The Judge was also obliged to consider uncontradicted State Department testimony of the direct relationships between treatment of foreign diplomats here and the safety and protection accorded our representatives abroad, and to consider Supreme Court precedent upholding laws regulating protests in front of courthouses, Cox v. Louisiana, 379 U.S. 559 (1965), upholding application of a trespass law to demonstrations at jails, Adderley v. Florida, 385 U.S. 39 (1966), and upholding regulation of expressive activity near a school, Grayned v. City of Rockford, 408 U.S. 104 (1972).

2. TRAC v. FCC

Telecommunications Research and Action Center (TRAC) v. FCC, 801 F.2d 501 (1986), reflects Judge Bork's commitment to protecting First Amendment values, and Mr. Frank is right to call attention to the case (although he does so only for the purpose of criticizing Judge Bork for seeming to believe that broadcast media should receive full First Amendment coverage). TRAC involved an FCC decision not to apply three forms of broadcast content regulation to the new technology of teletext. The FCC found that: (1) television stations could fulfill the requirement of affording candidates reasonable access to broadcasts by allowing access to regular broadcast operations not including teletext; (2) that statutory "equal opportunity" requirements do not apply to teletext; and (3) that it had no obligation to extend its own regulatory policies (apart from statutory regulations) to new technologies, where to do so would hamper the development of those technologies and would not be in the public interest. Judges Bork and Scalia agreed with findings (1) and (3), but reversed the FCC with regard to finding (2) because the statute involved does apply to teletext as a "broadcast" and has been found constitutional by the Supreme Court. As Professor Stewart has testified: "Judge Bork's opinion is thorough, well-reasoned, and persuasive .... Judge Bork's analysis is also a powerful and indeed devastating demonstration of bankruptcy in a [Supreme Court] distinction [between print and broadcast media] which he must nonetheless follow and does so conscientiously."

Judge Bork's intellectual honesty is such that he refused to accept the FCC's proferred distinction of teletext from "traditional broadcast services," even though adopting that distinction would have allowed teletext to remain totally exempt from regulatory statutes that many find constitutionally problematic. As Judge Bork wrote: "The dispositive fact is that teletext is transmitted over broadcast frequencies that the Supreme Court has ruled scarce and [therefore] ... content regulable." 801 F.2d at 508. Equally significant, however, is the insight Judge Bork's discussion provides into his First Amendment views as he joins other respected scholars to decry the "scarcity" rationale (used to permit content regulation of broadcasts which restrictions would be unconstitutional if applied to the print media). See Bazelon, FCC Regulation of the Telecommunications Press, 175 Duke L.J. 213; Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

3. Loveday

Judge Bork's ardent commitment to protecting First Amendment values is further evidenced by Loveday v. FCC, 707 F.2d 1443 (1983). Judge Bork was joined in that unanimous opinion by Judge MacKinnon and Judge Ruth Bader Ginsburg. There, in keeping with statutory requirements, radio stations had identified the sponsor of a political advertisement (in this instance, a political action committee called Californians Against Regulatory Excess). The FCC rejected claims that the stations were required to go beyond the statute to launch in-depth investigations into the background of the sponsoring group, reasoning that "a licensee confronted with undocumented allegations and an undocumented rebuttal may safely accept the apparent sponsor's representations that he is the real party in interest." The court upheld the FCC's interpretation.

While Loveday is a straightforward statutory interpretation case, Judge Bork's opinion is worth quoting at some length to show his sensitivity to First Amendment concerns -- a sensitivity that is the basis for Mr. Frank's attack on this opinion. The Judge wrote:

> Were we to approve a stringent obligation to investigate ... the most likely result would be that many stations, in lieu of incurring the expense of the investigation and the risk that the Commission would later assess their duties differently, would try, possibly by imposing burdensome disclosure requirements on advertisers, to avoid carrying advertisements of the type involved here. If so, opponents of groups sponsoring political messages would have a ready means of harassing and perhaps silencing their adversaries by making charges, however baseless, that the true sponsor of a political advertisement was someone other than the named sponsor. The rule petitioners seek might, therefore, have the effect of choking off many political messages. Quite aside from any First Amendment difficulties that such a rule might implicate, we are certainly not prepared to say that the public would be benefited from a decline in the number and variety of political messages it receives. Even more certainly, any such decision concerning the public benefits of such a rule should come from Congress and not this court .... [and] [W]here the law's attempt to discover the true utterers of political messages becomes so intrusive and burdensome that it threatens to silence or make ineffective the speech in question, the law presses into areas which the guarantee of free speech makes at least problematic.

707 F.2d at 1458-1459. Mr. Frank's dispute with such values is a quarrel with our fundamental law, not an argument against Judge Bork's fitness for the Court.

"Miscellaneous"

1. American Cyanamid

The concluding section of Mr. Frank's statement treats three "miscellaneous" cases brought together to show that Judge Bork "is a paradox." This charge is vaguely explained as meaning that the Judge does not let his personal policy views control his reading of the law, a trait seemingly more admirable than paradoxical. The first of the cited cases is Oil, Chemical and Atomic Workers International Union v. American Cyanamid Co., 741 F.2d 444 (1984), a case that has been discussed more than thoroughly during the course of the hearings. A unanimous panel upheld an Occupational Safety and Health Review Commission ruling that a company policy requiring sterilization for women who continued to work in a plant where lead levels posed great dangers for fetuses did not violate the terms of the Occupational Safety and Health Act. Under company policy, female employees were not automatically discharged, but were presented with what Judge Bork called a "most unhappy choice."

Mr. Frank's description of the case is appalling. He writes: "Bork had no trouble with holding that the way to make the plant safe was to deprive women of their childbearing capacity." He thus falsely attributes the company's policy to Judge Bork personally and, worse, implies that the policy was one with which Judge Bork had "no trouble." Judge Bork, of course, played no part at all in deciding any "way to make the plant safe"; rather, he and his fellow judges held that the company policy, once made, did not violate the proscriptions of the congressional enactment at issue. They did note further that the policy "may be an 'unfair labor practice' under the National Labor Relations Act or a forbidden sex discrimination under Title VII of the Civil Rights Act of 1964." 741 F.2d at 450 n.1. In no way did they personally endorse the policy. As Professor

Stewart observes, "Judge Bork's well-crafted opinion acknowledges the painful and far-reaching implications of the case but provides good reasons for insisting on the limited authority of judicial office."

2. Brown and Williamson Tobacco

In his discussion of the next case that he selects, FTC v. Brown and Williamson Tobacco Corp., 778 F.2d 35 (1985), Mr. Frank shows that it may be he who "is a paradox." Having acknowledged in his discussion of Lebron that prior restraints on speech are not favored in the law, Mr. Frank reverses ground here in attacking Judge Bork (along with Judges Edwards and Scalia) for limiting a prior restraint that would have precluded a tobacco company even from running certain advertising that was neither false nor deceptive. Judge Bork did hold that false and deceptive advertising claims may constitutionally be prohibited, but modified the district court's restraints so as to accord with the rule that "any restrictions imposed on deceptive commercial speech can be no 'broader than reasonably necessary to prevent the deception'." 778 F.2d at 43 (citation omitted). This case demonstrates the care and effort Judge Bork takes to ensure that all constitutionally protected speech in fact receives protection. Rather than herald Judge Bork for proclaiming, as he does, that "[b]oth consumers and society have a strong interest 'in the free flow of commercial information'," 778 F.2d at 43, quoting Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 763 (1976), Mr. Frank denigrates the panel for being insufficiently restrictive. Again, the Constitution and Supreme Court precedent are on Judge Bork's side, regardless of Mr. Frank's personal preferences.

3. Singleton

The last of Mr. Frank's "miscellaneous" cases is United States v. Singleton, 759 F.2d 176 (1985), rehearing en banc denied 763 F.2d 1432 (1985). This is a procedural case holding that an earlier ruling of a different D.C. Circuit panel was indeed binding upon a lower, district court. Singleton arose from the armed robbery of a fast food store, after which violent crime Mr. Singleton was identified by eyewitnesses as the gun wielder. Mr. Singleton then skipped bail and remained a fugitive for five and one-half years until he was arrested on an unrelated arson charge. After he was found guilty on the robbery counts, the trial judge reversed the jury's finding on the grounds that the eyewitness testimony was not reliable. That ruling was appealed, and the matter went to the D.C. Circuit. A panel of that higher court held ["Singleton I"] that the identifications were reliable, and reversed the district court's judgment. The district court judge thereupon refused to admit the identification testimony at Singleton's retrial -- on the grounds that the evidence was not reliable.

That ruling was appealed, and it was in this setting that the case then came to Judge Bork sitting on another panel of the D.C. Circuit. Judge Bork, with Judge Scalia, vindicated the Circuit's earlier ruling as "the law of the case"; the district court could not substitute its opinion for that of the court of appeals. As Judge Bork explained in his statement agreeing with the full court's decision to let stand his holding: "The issue in Singleton I was reliability and the issue subsequently before the district court was reliability .... [W]e therefore applied an ancient and self-evident maxim: 'Things which are equal to the same thing are also equal to one another'." 763 F.2d at 1434. In other words, as Judge Bork wrote, "the governing principle in this case was first formulated by a geometer." 763 F.2d at 1432 at 1433 (statement of Judge Bork).

Mr. Frank's sole analysis of this case is to attribute that quotation, incorrectly, to Judge Wright in dissenting from the full court's decision not to reconsider Judge Bork's holding.

In his conclusion, Mr. Frank mentions just one of Judge Bork's labor law cases, Restaurant Corp. of America v. NLRB, 801 F.2d 1390 (1986), which he does not really critique. He does not mention other of Judge Bork's significant labor law opinions, such as United Mine Workers of America v. MSHA, No. 86-1239 (July 10, 1987) (agency may not exempt individual mining companies from a mandatory safety standard), or Amalgamated Transit Union v. Brock, 809 F.2d 909 (1987)(reversing a Department of Labor certification that proper arrangements to protect collective bargaining rights had been made).

The CHAIRMAN. Senator Thurmond.

Senator THURMOND. Ms. LaHaye, I just wanted to congratulate your organization and the members of your organization for your interest in public affairs, for your interest in the welfare of America and the high principles that you enunciate and for which you stand, your patriotism and love of country which this organization has shown. I feel this is very important, and if there is anyone group in this country that ought to be listened to, it seems to me, it's your group instead of some other fringe group.

Ms. LAHAYE. Thank you, sir.

The CHAIRMAN. Thank you very much, Madame President.

Senator Specter.

Senator SPECTER. My question goes to the subject of equal protection of the laws and Judge Bork's position in his writings that the equal protection clause traditionally applies on racial situations under the intent of the framers of the 14th amendment, and more recently Judge Bork has expanded that statement to include ethnics.

During the course of his testimony in the hearings for the first time he said that he would accept the settled interpretation of the equal protection clause to apply more broadly to indigents, to illegitimates, to women, and then there was an extended discussion as to the standard that would be applied, and Judge Bork said he would accept Justice Steven's standard of reasonableness in terms of the appropriate line of scrutiny.

My first question to you is are you concerned that the equal protection clause be extended to women? Do you think that it is important for a vindication of women's rights that women should be included within the coverage of the equal protection clause?

Ms. LAHAYE. We believe the equal protection clause should include everyone, and we are comfortable with the testimony that Judge Bork gave. We have no reason to doubt him. We accept it as he testified.

Senator SPECTER. The concern that I have is that, in the application, there may be some conscience reluctance to apply it as fully as others who have adhered to the interpretation of the equal protection clause.

The Court has applied equal protection for 101 years beyond the range of racial situations going back to the famous case where the Chinese alien applied for a laundry licence in San Francisco, and the Supreme Court said in 1886 that equal protection applied.

So that the concern has arisen as to whether Judge Bork's coverage would be as full as it might be had he accepted the traditional interpretation at an earlier date, but the essence of your position is that you feel fully comfortable with what Judge Bork has said.

Ms. LAHAYE. We are comfortable. We accept it, yes.

Senator SPECTER. And you do think that it is important that the equal protection clause be applied to women?

Ms. LAHAYE. Yes.

Senator SPECTER. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Madame President.

Our next witness will be Vilma S. Martinez, a partner in a Los Angeles law firm. She served for nearly 10 years as president and general counsel of the Mexican American Legal Defense and Educational Fund, and in 1982, she became a partner in the Los Angeles law firm of Munger, Tolles and Olson. She has served as a member of the board of regents at the University of California, including a 2-year term as chairperson from 1984 to 1986.

I would like very much to welcome her today. Ms. Martinez, thank you for coming. Would you stand to be sworn?

Ms. MARTINEZ. Thank you.

The CHAIRMAN. Do you swear the testimony you are about to give will be the whole truth and nothing but the truth so help you God?

Ms. MARTINEZ. I do.

The CHAIRMAN. Thank you very much for taking the time and traveling the distance. It's a long way, I know.

Ms. MARTINEZ. Especially changing planes in St. Louis last night.

The CHAIRMAN. Believe me back in the days, weeks ago, when I was traveling thousands of miles a week, there's one consolation to my newfound status as only chair of the committee and that is I do not have to go through St. Louis or Chicago for awhile.

Ms. MARTINEZ. I can understand that.

The CHAIRMAN. I love both the cities but not their airports.

Please proceed.

TESTIMONY OF VILMA S. MARTINEZ

Ms. MARTINEZ. Mr. Chairman, it is I who want to thank you and members of this committee for inviting me to testify on the nomination of Judge Robert Bork as a Justice of the U.S. Supreme Court.

For the reasons which I address in my written and oral presentation, I urge this committee not to recommend the nomination of Judge Bork to the full Senate.

When Supreme Court Justice O'Connor was before this committee during her confirmation hearings she said, and I quote, "As the first woman to be nominated as a Supreme Court Justice, I am particularly honored and I happily share the honor with millions of American women of yesterday and of today whose abilities and whose conduct have given me this opportunity for service. As a citizen and as a lawyer and as a judge, I have from afar always regarded the Court with the reverence and the respect to which it is so clearly entitled because of the function it serves. It is the institution which is charged with the final responsibility of insuring that basic constitutional doctrines will always be honored and enforced. It is the body to which all Americans look for the ultimate protection of their rights. It is to the U.S. Supreme Court that we all turn when we seek that which we want most from our government: equal justice under the law."

Few people in recent years have better described the role of the Supreme Court in our system of government. Most importantly, the Supreme Court deals with the fundamental issues of how Americans choose to live together as a nation. Our Constitution and our laws help to define who shall go to school, who shall vote, who shall work and who shall represent us in public office.

The deliberations and decisions of this ultimate tribunal must reflect not only that ours is a government of laws but that we are a nation of people. Supreme Court decisions have had particular importance life and death importance for American citizens of Mexican origin.

In 1947, a 19-year-old Mexican American youth was convicted of murder in Hudspeth County, Texas, even though he was blind, mentally retarded and retaliating for an attack on his aging father. Despite these circumstances, an all-white jury found the youth guilty of first degree murder and sentenced him to death.

On appeal, the youth's attorney argued that he had not been tried by a jury of his peers, pointing out that although Hudspeth County was 50 percent Mexican American, no Mexican American had ever served on a jury. He cited a Supreme Court ruling that outlawed exclusion of blacks from juries.

The appeals court held that the 14th amendment did not protect Mexican Americans in the same way and the youth was executed later that year.

During World War II, Mexican Americans were drafted into the armed forces in large numbers, became the country's most decorated ethnic group during the war. Mexican Americans who were hailed as Yankee liberators in Paris returned home to find employment notices which still read "Help Wanted, Anglo, No Mexicans."

Separate bathrooms bore the label "Hombres Aqui," (men here). Restaurant sign posts announced "No Mexicans Served." The refusal of a Texas white establishment to bury Felix Longoria, a Mexican American war hero, in a military cemetery at Three Rivers, Texas, served as the catalyst for Dr. Hector Garcia's formation of the American G.I. Forum in 1948.

This post-war period also witnessed the first effective use of the Court as a means of gaining equality.

The CHAIRMAN. If I can interrupt, more people should know that Dr. Garcia is one of the true civil libertarians and civil rights leaders in this country on a par with people like Dr. King, and is still, as you know, making his weight felt in many ways. I hope more Americans will come to understand and know that as Mexican Americans take their rightful place in the leadership of this country. He is quite a man. I just want to make that point.

Ms. MARTINEZ. I deeply appreciate that and I know Dr. Garcia will, too.

The postwar period also witnessed the first effective use of the courts as a means of gaining equality for Mexican Americans. The crucial case was *Hernandez* v. *Texas*, a case argued before the Supreme Court by San Antonio attorneys Carlos Cadena and Gus Garcia.

Pete Hernandez, the defendant, had been tried, convicted for murder in Jackson County, an area 14 percent Mexican American. His jury panel had not included one Hispanic person. In fact, no Spanish-surname person had served on any jury of any sort in Jackson County during the previous 25 years.

Hernandez was the first Mexican American discrimination case to reach the nation's high court, and it was a victory. Chief Justice Warren held for a unanimous Supreme Court that the State court had erred in limiting the scope of the equal protection clause to the white and Negro classes and that persons of Mexican descent were a distinct class entitled to the protection of the 14th amendment.

The legal implications of *Hernandez* curiously decided the same month as *Brown* v. *Board of Education* were profound. During my lifetime I have witnessed the mighty changes wrought by *Brown, Hernandez* and their progeny. I have been privileged to work on such cases as *Plyler* v. *Doe, Griggs* v. *Duke Power Company, Philips* v. *Martin Marietta,* and I have been able to live and practice law in a time when the right of women to equal protection has been recognized and enforced.

Judge Bork, in his public statements and his writings, show us a man who has a keen intellect and a knowledge of legal precedent and who attacks complex legal problems as the grand master attacks a chess board. He does not show us a man, much less a lawyer or a judge who understands that equal protection and due process are not arcane legal principles which occasionally affect a few individuals. They are the soul of our nation.

Through his writings, speeches and testimony before this committee, Judge Bork has demonstrated his disagreement with some of the most crucial equal protection decisions of our lifetime, announced his adoption of a reasonable basis test which would provide less equal protection to racial minorities and women than they currently enjoy and announced his opposition to constitutional protection for racial minorities and women from discrimination by the federal government.

Because of this, Judge Bork does not deserve to be confirmed as an Associate Justice of the Supreme Court. Judge Bork disagrees with Supreme Court decisions finding judicial enforcement of racially restrictive covenants to be unconstitutional, striking down the poll tax laws, establishing the one-person, one-vote principle, upholding Congress' bans of literacy tests for voting and upholding recent gender conscious affirmative action.

With regard to all of these landmark decisions, Judge Bork reiterated his disagreement with these decisions in his confirmation testimony before this committee. This is described in more detail in my written presentation, but I want to focus on his views concerning *Harper* v. *Virginia State Board of Elections,* the poll tax case and *Oregon* v. *Mitchell,* the literacy ban case.

First the poll tax case. Poll tax laws were a common means of disenfranchising minority and poor voters, and I think it is important to know the manner in which the poll tax law worked in Virginia. Voters were required to pay a tax of $1.50 6 months before the election in which they wished to vote. Voters received no notice that the tax was due unless they owned sufficient property to be subject to the personal property tax, in which case the poll tax was included in the property tax assessment.

Registered voters who failed to pay the tax were removed from the rolls. New registrants were required to pay a retrospective poll tax for previous years in which they had not paid the tax.

In *Harper,* the Supreme Court held this Virginia law unconstitutional under the equal protection clause of the 14th amendment on the ground that the poll tax law denied the fundamental right to vote to those unable to pay a fee to vote.

Judge Bork has dismissed this poll tax as a very small poll tax which was not discriminatory and he has characterized *Harper* as wrongly decided. Judge Bork unfortunately overlooks the fact that the genesis of the turn of the century enactment of poll tax laws throughout the South was no secret. In fact, in the same year that the Supreme Court in *Harper* recognized the racial purpose of the Virginia poll tax law, similar findings were made by lower federal courts regarding poll tax laws in Texas and in Alabama.

Further, race considerations aside, Judge Bork blindly overlooks the fact that financial and property restrictions on the fundamental right to vote are inconsistent with equal protection.

The CHAIRMAN. Ms. Martinez, I am going to have to ask you to sum up pretty soon. Take just another couple minutes, but if you could.

Ms. MARTINEZ. $1.50 might not mean much to those of us privileged to be here today but it means a lot for poor Americans.

In the *Oregon* v. *Mitchell* case, which struck down literacy tests, Judge Bork has criticized that decision as very bad, indeed, pernicious constitutional law while at the same time admitting on September 17th of this year to this committee "I have in matter of fact no view of literacy tests. I have never looked at how they operate."

Those of us who have looked at how they operate have quickly learned that those were used to disenfranchise the poor, the unpopular, and minorities—Americans all.

In conclusion, I'd want to say this. Millions of Americans who are not legal scholars care deeply about the task before you. They care not because of concern about Judge Bork's intellect or his knowledge of legal precedent. They care because the Supreme Court affects their lives, our lives as much as any other institution on this earth.

Many poor Americans, black Americans, women, Hispanics have gained a foothold on the ladder of opportunity and equality only by attacking very small poll taxes, securing reapportionment based on one person, one vote, striking down literacy tests, and all Americans have benefitted as a result.

We can share more equally the burdens as well as the joys of citizenship. We do not need on the Supreme Court a Justice who relishes this appointment as an "intellectual feast." We want, we need and I hope you give us a judge to whom we can turn with confidence as Justice O'Connor so aptly phrased it, "When we seek that which we want most from our government: equal justice under the law."

Thank you, gentlemen.

Senator KENNEDY. Thank you very much, Ms. Martinez, for an excellent presentation. I'm always impressed by those who come before our committee that are not just students of the law or even academicians, although there is a powerful voice for their involvement because they are teaching our young people, but I'm particularly impressed by those that have had a real lifetime of activity in these areas of which they speak.

Anyone that knows of your work as I do from personal association and conduct, the work that you've done with the NAACP years ago, as the general counsel/president of MALDEF, knows of your involvement and activity in these areas.

You bring, I think, a perspective which is of great value. This isn't an academic exercise for you.

Ms. MARTINEZ. Not at all.

Senator KENNEDY. This is something which you've gone through with, I'm sure, enormous amount of toil and an incredible amount of dedication, and I want to express my own appreciation for your presence here.

Ms. MARTINEZ. Thank you, Senator.

[The statement of Ms. Martinez follows:]

Statement of Vilma S. Martinez
on the Nomination of Judge Robert H. Bork
To Be an Associate Justice of the
Supreme Court of the United States

Senate Committee on the Judiciary

September 30, 1987

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STATEMENT OF VILMA S. MARTINEZ

My name is Vilma S. Martinez, member of the bars of the State of New York and the State of California and of the Supreme Court of the United States.

I graduated from Columbia Law School in 1967, and started working that year as a Staff Attorney with the NAACP Legal Defense and Educational Fund. In 1970, I became Equal Employment Opportunity Counsel for the New York State Division of Human Rights; and in 1971, I joined the New York law firm of Cahill Gordon & Reindel as an associate. In 1973, I was elected President and General Counsel of the Mexican American Legal Defense and Educational Fund ("MALDEF"), and I served in that role until 1982, when I joined the Los Angeles law firm of Munger Tolles & Olson as a litigation partner, where I remain today.

In my career as an attorney I have represented plaintiffs, both individuals and classes, in civil rights litigation; and I have represented corporate clients in commercial litigation in New York and California. Between 1982 and 1984, I served as a member of the Board of Trustees of the Los Angeles County Bar Association. In 1976, I was appointed to the Board of Regents of the University of California, and between 1984 and 1986, I served as Chairman of that Board.

Mr. Chairman and Members of the Committee, I am honored that you have invited me to testify on the nomination of Judge Robert H. Bork as a Justice of the United States Supreme Court. For the reasons which I address below I urge this Committee not to recommend the nomination of Judge Bork to the full Senate.

In this Statement, I primarily address the fundamental rights guaranteed by the Fourteenth Amendment's equal protection clause. This discussion is prefaced by several introductory remarks.

INTRODUCTION

When Supreme Court Justice O'Connor was before this Committee during her confirmation hearings, she stated:

> As the first woman to be nominated as a Supreme Court Justice, I am particularly honored, and I happily share the honor with millions of American women of yesterday and of today whose abilities and whose conduct have given me this opportunity for service. As a citizen and as a lawyer and as a judge, I have from afar always regarded the Court with the reverence and with the respect to which it is so clearly entitled because of the function it serves. It is the institution which is charged with the final responsibility of insuring that basic constitutional doctrines will always be honored and enforced. It is the body to which all Americans look for the ultimate protection of their rights. It is to the U.S. Supreme Court that we all turn when we seek that

> which we want most from our Government: equal justice under the law.

Hearings Before the Senate Comm. on the Judiciary on the Nomination of Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the United States Supreme Court, 97th Cong., 1st Sess. 57 (1981) (emphasis added).

Few people in recent years have better described the role of the Supreme Court in our system of government. It is, at the same time, the highest level of appeal in our legal system, the forum for certain disputes between sovereign states of the United States, and the ultimate check and balance in maintaining and nurturing our constitutional system of government.

Most importantly, the Supreme Court deals with the fundamental issues of how Americans choose to live together as a nation. Our Constitution and our laws help to define who shall go to school, who shall vote, who shall work, and who shall represent us in public office. The deliberations and decisions of this ultimate tribunal must reflect not only that ours is a government of laws but that we are a nation of PEOPLE.

Supreme Court decisions have had particular importance -- life and death importance -- for American citizens of Mexican origin.1 In 1946, historian Pauline Kibbe wrote that Mexican American farmworkers were "but a species of farm implement that

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1. This brief discussion of Mexican American legal history is from the report of the Mexican American Legal Defense and Educational Fund ("MALDEF"), entitled Diez Anos, describing the first ten years' work of that organization.

comes mysteriously into being coincident with the maturing of the cotton, that requires no upkeep or special consideration during the period of its usefulness, needs no protection from the elements, and when the crop has been harvested, vanishes into the limbo of forgotten things -- until the next harvest season rolls around." In 1947, a 19-year-old Mexican American youth was convicted of murder in Hudspeth County, Texas, even though he was blind, mentally retarded, and retaliating for an attack on his aging father, and was physically unable to have the legally necessary intent to justify a finding of first-degree murder. Despite these circumstances, an all-white jury found the youth guilty of first-degree murder and sentenced him to death. On appeal, the youth's attorney argued that he had not been tried by a jury of his peers, pointing out that though Hudspeth County was 50% Mexican American, no Mexican American had ever served on a jury. He cited a Supreme Court ruling that outlawed exclusion of blacks from juries. The appeals court held that the Fourteenth Amendment did not protect Mexican Americans in the same way, and the youth was executed later that year.

During World War II, Mexican Americans were drafted into the Armed Forces in large numbers and became the country's most decorated ethnic group during the War. Mexican Americans, who were hailed as Yankee liberators in Paris, returned home to find employment notices which still read, "Help Wanted, Anglo. No Mexicans." Separate bathrooms bore the label "Hombres Aqui." Restaurant signposts announced "No Mexicans served." The refusal of the Texas white establishment to bury Felix Longoria, a Mexican American war hero, in a military cemetery at Three Rivers, Texas, served as a catalyst for Dr. Hector Garcia's formation of the American G.I. Forum in 1948.

The post-war period also witnessed the first effective use of the courts as a means of gaining equality for Mexican Americans. In the late 1940s, Carlos Cadena, a Mexican American attorney in San Antonio, Texas, won a lawsuit which stopped the use of the restrictive covenants that had prevented land in Anglo neighborhoods from being sold to Mexicans or blacks. The crucial case, however, was Hernandez v. Texas, 347 U.S. 475 (1954), a case argued before the Supreme Court by attorneys Cadena and Gus Garcia. Pete Hernandez, the defendant, had been tried and convicted for murder in Jackson County, an area which was 14% Mexican American. His jury panel had not included one Hispanic person. In fact, no Spanish-surnamed person had served on any jury of any sort in Jackson County during the previous 25 years. Hernandez was the first Mexican American discrimination case to reach the nation's high court, and it was a victory. Chief Justice Warren held for a unanimous Supreme Court that the state court had erred in limiting the scope of the equal protection clause to the white and Negro classes; and that persons of Mexican descent were a distinct class entitled to the protection of the Fourteenth Amendment. The legal implications of the Hernandez decision, decided the same month as Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), were profound.

During my lifetime, I have witnessed the mighty changes wrought by Brown, Hernandez, and their progeny. I have been priviliged to work on such cases as Plyler v. Doe, 457 U.S. 202 (1982), Griggs v. Duke Power Co., 401 U.S. 424 (1971), and Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971). And I have been able to live and practice law in a time when the right of women to equal protection has been recognized and enforced.

Judge Bork, in his public statements and his writings, shows us a man who has a keen intellect and a knowledge of legal precedent, and who attacks complex legal problems as a grand master attacks a chess board. He does not show us a man, much less a lawyer or a judge, who understands that equal protection and due process are not arcane legal principles which occasionally affect a few individuals. They are the soul of our nation. Millions of Americans attend school, obtain jobs, serve in public office, and vote in state and federal elections because of our constant dedication to these principles.

We cannot know what will be the circumstance of tomorrow's issues involving due process and equal protection. But we do know that those decisions must be made with a respect for the Constitution and an understanding that the decisions will inevitably affect how millions of Americans live.

In Judge Bork's much-quoted Indiana Law Journal article "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Journal 1 (1971), he speaks of the Supreme Court as a "major power center," id. at 2, in part because of its power to define the freedoms of both the majority and the minority througl the interpretation of the Constitution. And in describing the role of the courts, he points out that "Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution." Id. at 10-11. He argues that most of "substantive due process ... is and always has been an improper doctrine," id. at 11; "that most of substantive equal protection is also improper," id.; and that "the equal protection clause has only two legitimate meanings": "formal procedural equality" and a requirement "that government not discriminate along racial lines," id. He argues that the "bare concept of equality provides no guide for courts," id. and he further asserts that, id. at 12:

> There is no principled way in which anyone can define the spheres in which liberty is required and the spheres in which equality is required. These are matters of morality, of judgment, of prudence. They belong, therefore, to the political community. In the fullest sense, these are political questions.

EQUAL PROTECTION

Through his writings, speeches, and testimony before this Committee, Judge Bork has: (1) demonstrated his disagreement with some of the most crucial equal protection decisions of our lifetime; (2) announced his adoption of a reasonable basis test which would provide less equal protection to racial minorities and women than they currently enjoy; and (3) announced his opposition to constitutional protection for racial minorities and women from discrimination by the federal government. On these bases alone, each of which is explored hereafter, Judge Bork does not deserve to be confirmed as an Associate Justice of the Supreme Court.

1. **Judge Bork Disagrees With and May Seek to Overrule Some of the Most Important Equal Protection Decisions of Our Lifetime.**

No doubt, the most important Supreme Court decision in our lifetime -- and in our country's presentation of our renewed liberty to the outside world -- was Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). Although the constitutional basis for Brown is contrary to the originalist views of Judge Bork, he nevertheless somewhat inexplicably has not severely criticized the constitutional underpinnings of Brown. In fact, he has even told this Committee that he agrees with the Court's result in Brown, whatever the constitutional basis of that decision might be.

Judge Bork, however, strongly disagreed in his testimony before this Committee with the result and reasoning in the companion case to Brown, the unanimous decision in Bolling v. Sharpe, 347 U.S. 497 (1954), in which the Court held that school segregation in the District of Columbia was unconstitutional.

This decision and Judge Bork's opposition to it are discussed toward the end of this statement.

What is discussed here is Judge Bork's disagreement with and opposition to other landmark equal protection decisions rendered both before and subsequent to Brown. Included are the Supreme Court decisions: (a) finding judicial enforcement of racially restrictive covenants to be unconstitutional; (b) striking down the poll tax laws; (c) establishing the "one-person one-vote" principle; and (d) upholding Congress' bans of literacy tests for voting. With regard to all of these landmark decisions, Judge Bork reiterated his disagreement with these decisions in his confirmation testimony before this Committee.

a. Enforcement of Racially Restrictive Covenants

Shelley v. Kraemer, 334 U.S. 1 (1948), in which the Supreme Court held that the Fourteenth Amendment prohibits state court enforcement of racially restrictive covenants in the sale of property, was a landmark case not only because of its holding but also because it was the first case in which the Solicitor General filed an amicus brief in a civil rights case. Opposing both the amicus position of the United States and the unanimous decision by the Supreme Court, Judge Bork has argued that there is no constitutional basis for the Shelley decision:

> I doubt ... that it is possible to find neutral principles capable of supporting ... Shelley v. Kraemer.... The decision was, of course, not

> neutral in that the Court was most clearly not prepared to apply the principle to cases it could not honestly distinguish.
>
> Shelley ... converts an amendment whose text and history clearly show it to be aimed only at governmental discrimination into a sweeping prohibition of private discrimination. There is no warrant anywhere for that conversion.

Bork, "Neutral Principles," 47 Indiana Law Journal 15-17 (1971).

During his confirmation hearings, Judge Bork reaffirmed his belief that there was no constitutional basis for Shelley, and he also argued that Shelley "has never been applied again." Transcript at 127 (Sept. 15, 1987). He is wrong on both counts.

First, Chief Justice Vinson's decision in Shelley was expressly based on extensive historical precedent holding that judicial actions are every bit as much the actions of government as are the laws passed by legislators and the actions of executive officials. The cases the Chief Justice relied on included Bridges v. California, 314 U.S. 252 (1941) (holding that court enforcement of a common law rule relating to contempts by publications constituted unconstitutional state action); American Federation of Labor v. Swing, 312 U.S. 321 (1941) (holding enforcement by state courts of common law to restrain peaceful picketing constituted state action prohibited by the Constitution); Cantwell v. Connecticut, 310 U.S. 296 (1940) (holding that a state conviction for breach of the peace violated the due process guarantee of freedom of religion); Ex parte Virginia, 100 U.S. 313 (1880) (holding unconstitutional the actions of a judge restricting jury service to whites). Numerous other decisions could also have been cited, including virtually every criminal case in which a judge is found to have violated a defendant's constitutional rights, and including the landmark prior restraint decision in Near v. Minnesota, 283 U.S. 697 (1931) (holding that a judicial prior restraint on the press violates the Fourteenth Amendment).

Second, as to the subsequent application of Shelley, the Supreme Court only five years later in Barrows v. Jackson, 346 U.S. 249 (1953), held that it would be a violation of the Fourteenth Amendment for a state court to award damages against a white seller who sold property to a black buyer in breach of a restrictive covenant. As the Court recognized:

> The action of a state court at law to sanction the validity of the restrictive covenant here involved would constitute state action as surely as it was state action to enforce such covenants in equity, as in Shelley.

Barrows, 346 U.S. at 254. More recently, in Palmore v. Sidoti, 466 U.S. 429 (1984), the Supreme Court held that a state court's denial of child custody to a white mother who had married a black husband violated the Fourteenth Amendment. Chief Justice Burger, writing for a unanimous Court, noted in passing that the "actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment." Palmore, 466 U.S. at 432 n.1, citing Shelley v. Kraemer, 334 U.S. 1 (1948), and Ex parte Virginia, 100 U.S. 339 (1880).

The point here is not simply that Judge Bork's characterizations of the law prior and subsequent to Shelley are wrong. Rather, the point is also that he appears to be insufficiently informed about, and perhaps unconcerned about, what the actual state of the law is on a matter of such importance to racial minorities.

b. Poll Tax Laws

Poll tax laws were a common means of disenfranchising minority and poor voters. The manner in which the poll tax law worked in Virginia is illustrative. Voters were required to pay the tax of $1.50 six months before the election in which they wished to vote. Voters received no notice that the tax was due unless they owned sufficient property to be subject to the state personal property tax, in which case the poll tax was included in the property tax assessment. Registered voters who failed to pay the tax were removed from the rolls. New registrants were required to pay a retrospective poll tax for previous years in which they had not paid the tax. In Harper v. Virginia State Board of Elections, 383 U.S. 663, 668 (1966), the Supreme Court held this Virginia law unconstitutional under the equal protection clause of the Fourteenth Amendment on the ground that the poll tax law denied the fundamental right to vote to "those unable to pay a fee to vote."

Judge Bork, in his writings and in two sets of testimony before this Committee, has disagreed with Harper. At his confirmation hearings before this Committee in 1973, Judge Bork dismissed the poll tax as "a very small poll tax which was not discriminatory," and he characterized Harper as "wrongly decided." Nomination of Robert H. Bork to be Solicitor General: Hearings Before the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess. 17 (1973). Judge Bork reiterated this criticism two years ago:

> [T]he Court frequently reached highly controversial results which it made no attempt to justify in terms of the historic constitution or in terms of any other preferred basis for constitutional decision making. I offer a single example. In Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), the court struck down a poll tax used in state elections. It was clear that poll taxes had always been constitutional, if not exacted in racially discriminatory ways.

Bork, "Forward," in G. McDowell, The Constitution and Contemporary Constitutional Theory, vii (1985). And Judge Bork confirmed his criticism of Harper this month in an exchange with Senator Heflin:

> Senator Heflin. Well, you know, I have looked back on a lot of decisions, but this poll tax, this Virginia thing, gives me concern. You basically, as I understand it, say that it was not discriminatory.
>
> Judge Bork. There was no allegation of discrimination in that case.
>
> Senator Heflin. There was no allegation? Is that the distinction you made? Because there is no question to me that a poll tax that required three years of history of payment, that the last payment had to be six months in advance, and you had to go to the courthouse to pay it was designed to prevent the poor and blacks from voting. I do not think there is any question that that is it.
>
> Judge Bork. Senator, I did not discuss the case in those terms, and the Supreme Court did not discuss the case as one in which a poll tax that was designed to keep blacks from voting.

Transcript at 17 (Sept. 18, 1987).

Among the problems with Judge Bork's disagreement with Harper is the fact that the Supreme Court in its decision expressly recognized that the "Virginia poll tax was born of a desire to disenfranchise the Negro." Harper, 383 U.S. at 666 n.3. This genesis of the turn-of-the-century enactment of poll tax laws throughout the South was no secret. In fact, in the same year that the Supreme Court in Harper recognized the racial purpose of the Virginia poll tax law, similar findings were made by lower federal courts regarding the poll tax laws in Texas and Alabama. In United States v. Texas, 252 F. Supp. 234 (W.D. Tex. 1966), a three-judge federal court held that a "primary purpose of the" Texas poll tax law "was the desire to disenfranchise the Negro." 252 F. Supp. at 245. The court noted a report of the Texas legislature that the poll tax was popular because of "a desire to disenfranchise the Negro," 252 F. Supp. at 244, and the court quoted contemporaneous accounts of the racial purpose underlying the original adoption of the Texas poll tax, 252 F. Supp. at 242-43 n.44. In United States v. Alabama, 252 F. Supp. 95 (M.D. Ala. 1966), another three-judge court found:

> [F]rom its inception the Alabama poll tax was illegal and invalid as an attempt to subvert the Fifteenth Amendment to the United States Constitution. The necessary effect of the poll tax as adopted in 1901 was to disenfranchise Negro voters. The history of the poll tax leaves no doubt that this was its sole purpose.

252 F. Supp. at 99 (brackets added). The words of the framers of the Alabama poll tax, according to contemporaneous accounts, were as avowedly racial as those at the Virginia convention:

> "[I]t is our purpose, it is our intention, and here is our registered vow to disenfranchise every

Negro in the state and not a single white man."
252 F. Supp. at 98 (brackets added).

Even if the poll tax laws struck down in Harper and in the other cases had not been racially motivated, Judge Bork's criticism of Harper as being wrongly decided is worrisome for another reason, i.e., that he believes that financial and property restrictions on the fundamental right to vote are perfectly consistent with his view of the equal protection clause. If so, Judge Bork disagrees with settled equal protection law holding that states may not restrict the fundamental right to vote to owners of real property, Hill v. Stone, 421 U.S. 289 (1975); Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. Houma, 395 U.S. 701 (1969); Kramer v. Union Free School District, 395 U.S. 621 (1969); and similarly holding that states cannot require candidates to pay large filing fees that exclude indigent candidates, Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1972).

c. The "One-Person One-Vote" Principle

Among the most important equal protection decisions of our era were the "one-person one-vote" reapportionment decisions in Reynolds v. Sims, 377 U.S. 533 (1964), and its progeny. Prior to Reynolds there were often enormous variations in the population of legislative districts within a state, a fact which allowed a small minority of voters to elect a majority of the state legislature. As a result of Reynolds, the districts from which state or local officials are elected now contain an equal population. Needless to say, Reynolds and its progeny have been crucial to the ability of all citizens, including of course minority citizens, to secure equal political representation.

Judge Bork has been a frequent critic of Reynolds and its progeny. In 1968, Judge Bork explained his criticism:

> [O]n no reputable theory of constitutional adjudication was there an excuse for the doctrine it imposed. What the Court in effect decided was that all state legislatures, including both houses of bicameral legislatures, must be apportioned on a population basis -- "one-man-one-vote" -- regardless of political, geographic, or historic considerations, or the analogy to the federal Congress, or any other factors that might suggest to the voters themselves the wisdom of some weighing of representation.
>
> Chief Justice Warren's opinions in this series of cases are remarkable for their inability to muster a supporting argument. They contain little more than a passionate reiteration that equal protection of the laws must mean equal weight for each vote.... [T]he "one-man-one-vote" rule, far from being an application of the Fourteenth Amendment, ran counter to the text of the amendment, the history surrounding its adoption and ratification, and the

political practice of Americans from colonial times onward. Bork, "The Supreme Court Needs a New Philosophy," Fortune, 166-68 (Dec. 1968). Three years later, Judge Bork reiterated that "Chief Justice Warren's opinions in this series of cases are remarkable for their inability to muster a single respectable supporting argument." Bork, "Neutral Principles," 47 Indiana Law Review 18 (1971). This past summer, Judge Bork proposed a reasonable basis alternative to the one-person one-vote principle:

> I wish [the Court] had followed the route that Justice Stewart laid out in the Colorado case -- Lucas against the General Assembly -- which is to say, "Show me that a majority can reapportion periodically, and I will approve almost any reasonable or rational result," which is to say "Just show me that the majority can reapportion."
>
> I think this Court stepped beyond its allowable boundaries when it imposed one man, one vote under the Equal Protection Clause. That is not consistent with American political theory, with anything in the history or the structure or the language of the Constitution.

Bork, "Bicentennial of the U.S. Constitution," 22-23 (Worldnet Interview, June 10, 1987). And, in his testimony before this Committee, Judge Bork reaffirmed his criticism of Reynolds and of the one-person one-vote principle. Transcript at 200 (Sept. 15, 1987).

Although Judge Bork has on occasion premised his criticism and his alternative proposal, as noted above, on the reasonable basis test proposed by Justice Stewart in several early dissenting opinions, Justice Stewart in fact eventually abandoned his reasonable basis test and instead accepted the one-person one-vote principle. See, e.g., Gaffney v. Cummings, 412 U.S. 735 (1973); Mahan v. Howell, 410 U.S. 315 (1973). But the circumstances of Justice Stewart's original dissents in 1964 are an indication of the degree of malapportionment which Judge Bork would regard as acceptable. In his since-recanted dissent in WMCA v. Lomenzo, 377 U.S. 663, 744-65 (1964), in which Justice Stewart first proposed his reasonable basis standard, Justice Stewart would have upheld districting plans in New York and Colorado under which barely one-third of the electorate could have elected a majority of the state legislature. WMCA v. Lomenzo, 377 U.S. at 647-48; Lucas v. Colorado General Assembly, 377 U.S. 713, 729 (1964). In Colorado the votes of some voters were worth 3.6 times as much as the votes of others, Lucas, 377 U.S. at 728; in New York the votes of some voters were worth 21 times as much as the votes of others. WMCA, 377 U.S. at 648. Disparities of this magnitude are apparently acceptable to Judge Bork under the reasonable basis standard now advocated by Judge Bork.

d. Congress' Ban on Literacy Tests

Katzenbach v. Morgan, 384 U.S. 641 (1966), and Oregon v. Mitchell, 400 U.S. 112 (1970), concern the validity of certain portions of the Voting Rights Act as enacted in 1965, and as amended in 1970.

In Katzenbach v. Morgan the Supreme Court upheld the constitutionality of Section 4(e) of the 1965 Act, which barred the states from requiring that voters be able to read or write in English so long as they had attended a school in the United States or Puerto Rico which was taught in a language other than English. The effect of Section 4(e) was to enfranchise the large number of Puerto Rican Americans, primarily those educated in Puerto Rico, who were literate in Spanish rather than English. The Supreme Court concluded that, regardless of whether a court might not hold the English language literacy requirements unconstitutional, Congress was empowered to ban such tests under Section 5 of the Fourteenth Amendment.

In Oregon v. Mitchell the Court upheld part of the 1970 amendments to the Voting Rights Act. Specifically, the Court unanimously agreed that Section 201 of the Act, which established a national ban on literacy tests, was constitutional. Several members of the Court reached this conclusion based on Section 5 of the Fourteenth Amendment.

Although Judge Bork is ordinarily deferential to majoritarian legislative power as against the rights of individuals, he has repeatedly criticized these decisions. In 1972, he stated:

> The Morgan decision embodies revolutionary constitutional doctrine, for it overturns the relationship between Congress and the Court. Under American constitutional theory, it is for the Court to say what constitutional commands mean and to what situations they apply. Congress may implement the Court's interpretation, as it is specifically empowered to do by Section 5 of the Fourteenth Amendment. But Section 5 was intended as a power to deal with implementations only. Morgan would also overturn the relationship between federal and state governments. Once Congress is conceded the power to determine what degree of equality is required by the equal protection clause, it can strike down any state law on the ground that its classifications deny the requisite degree of equality. Morgan thus improperly converts Section 5, which is a power to deal with remedies, into a general police power for the nation.

Bork, Constitutionality of the President's Busing Proposals, 10 (American Enterprise Institute, 1972). That same year, Judge Bork reiterated his disagreement with "the broad, revolutionary sweep of the opinion." Hearings on the Equal Educational

Opportunity Act Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare, 92nd Cong., 2d Sess. 1509 (1972).

In 1981, Judge Bork asserted: "I agree entirely with the dissent ... in Katzenbach v. Morgan." Hearings on the Human Life Bill Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 310 (1981). He continued:

> [I]n Katzenbach v. Morgan, 384 U.S. 641 (1966), the Court held that Congress could eliminate literacy in English as a condition for voting by exercising the power granted in Section 5 of the Fourteenth Amendment. In Oregon v. Mitchell, 400 U.S. 112 (1970), a unanimous Court upheld Congress' elimination of all literacy tests. There are other decisions that declare a congressional power to define substantive rights guaranteed by the thirteenth, fourteenth, and fifteenth amendments by employing the granted power to "enforce" the provisions of those amendments.... [It is] my conviction that each of these decisions represents very bad, indeed pernicious, constitutional law.

Id. In a speech to the Seventh Circuit, apparently given in 1981, Judge Bork again denounced the decision:

> Katzenbach v. Morgan is terrible constitutional law. It stands for a revolution in the constitutional roles of the judiciary and the legislature. It cannot live in the same jurisprudence with Marbury v. Madison.... Liberal approval of Katzenbach v. Morgan was unprincipled.

Speech, Seventh Circuit, 5 (undated).

Judge Bork reaffirmed his position in his testimony before this Committee. For example, in response to a question from Senator DeConcini, Judge Bork explained: "But my views on Katzenbach v. Morgan have not changed." Transcript at 71 (Sept. 16, 1987). The following day, however, Judge Bork added: "I have, in matter of fact, no view of literacy tests. I have never looked at how they operate." Transcript at 69 (Sept. 17, 1987).

If the Supreme Court were to overrule Katzenbach v. Morgan and Oregon v. Mitchell, the practical consequences would be extraordinary.

Most immediately, all existing state literacy requirements would automatically go back into effect. For example, the New York English language requirement at issue in Katzenbach is still contained in that state's constitution. New York Constitution, Art. II, Sec. 1. Several hundred thousand Puerto Rican residents of New York would be immediately disenfranchised.

There also would be longer-term ramifications in that a number of civil rights statutes dating back to 1866 would probably have to be declared unconstitutional, at least in part. First, the Civil Rights Act of 1866, which bars racial discrimination by private entities and individuals, has been upheld under the enforcement section of the Fourteenth Amendment, even though such private conduct is not state action and does not violate either the Thirteenth or Fourteenth Amendments. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437-44 (1968). The 1866 Act probably could not be upheld if Katzenbach were overturned. Second, the "discriminatory effect" test of the Voting Rights Act of 1965 would be in jeopardy. In City of Rome v. United States, 446 U.S. 156 (1980), the Supreme Court, relying on Katzenbach v. Morgan and Oregon v. Mitchell, rejected a challenge to the constitutionality of this "discriminatory effect" standard. City of Rome, 446 U.S. at 176-78. Third, part of the employment discrimination provisions in Title VII of the Civil Rights Act of 1964, as extended to the states in 1972, would also be in jeopardy. Several members of the Supreme Court have noted that the application of the Title VII "discriminatory effect" test to the states may turn on the meaning and vitality of Katzenbach v. Morgan. Fitzpatrick v. Bitzer, 427 U.S. 445, 458 (1976) (Brennan, J., concurring). Finally, the Supreme Court has held that Congress can make it a crime for private individuals to engage in conspiracies or violence for the purpose of punishing or preventing exercise of constitutional rights, such as the right to vote. United States v. Guest, 383 U.S. 745 (1966); id.

at 761-63 (Clark, J., concurring); id. at 774-86 (Brennan, J., concurring). Since such private conspiracies and violence are not state action, and thus do not themselves violate the Constitution, Congress might well be powerless in Judge Bork's view to protect Americans from attack or retaliation by extremist groups.

2. Judge Bork Would Permit Any Discrimination Under the Equal Protection Clause So Long as There Is Some Reasonable Basis for the Discrimination, a Standard Which Would Provide Less Protection to Racial Minorities and Women Than Is Currently Guaranteed.

In his writings and speeches prior to these confirmation hearings, Judge Bork argued that the Fourteenth Amendment's guarantee of equal protection should be limited to matters of race and ethnicity, thereby excluding protection from gender discrimination and from other forms of discrimination. For example, in his now-famous 1971 law review article, Judge Bork stated that "cases of race discrimination aside, it is always a mistake for the Court to try to construct substantive individual rights under the due process or the equal protection clause." Bork, "Neutral Principles," 47 Indiana Law Review 18 (1971). Stated differently and more recently: "I do think the Equal Protection Clause probably should have been kept to things like race and ethnicity." Bork, "Bicentennial of the U.S. Constitution," 12 (Worldnet Interview, June 10, 1987).

During his testimony before this Committee, Judge Bork abandoned his totally exclusionary approach and agreed that the equal protection clause does protect all persons. But he also announced both his rejection of the Supreme Court's standards for determining unconstitutional discrimination and his proposed replacement of those standards with a single reasonable basis test for determining the constitutionality of all forms of discrimination. He thereby proposed to remove the strong constitutional protection from discrimination currently accorded to racial minorities, women, and other vulnerable individuals.

As this Committee is now well aware, under settled constitutional doctrine the Supreme Court applies a three-tiered approach to determine Fourteenth Amendment constitutionality of governmentally drawn distinctions and discriminations.

First, for discrimination against racial minorities and aliens, the Court uses a strict scrutiny standard which permits the discrimination to stand only if justified by a compelling governmental interest. Under this strict scrutiny test, challenged intentional discrimination is virtually always held unconstitutional.

Second, with regard to discrimination based on gender or on the illegitimacy of children, the Court uses a heightened scrutiny standard which allows the discrimination to stand only if the distinction serves important governmental objectives and if the discriminatory means employed are substantially related to the achievement of those objectives. Under this intermediate standard, nearly every instance of discrimination against women which has reached the Court in the past decade has been struck down as unconstitutional.

Finally, as to all other distinctions and discriminations (ordinarily economic distinctions among corporate enterprises), the Court applies a rational basis or reasonable basis test which permits the discrimination to stand so long as it is supported by any rational or reasonable basis. Under this lowest standard, only a few instances of challenged discrimination have been found unconstitutional in the past two decades.

Rejecting the established three-tier approach in testimony before this Committee, Judge Bork proposed instead a single reasonable basis test. For example, when asked by Senator DeConcini whether he would take the established three-tier approach "to the Court, if you are confirmed," Judge Bork replied: "No." Transcript at 143 (Sept. 17, 1987). His single test, Judge Bork ventured, "is an entirely different methodology. Instead of saying what degree of scrutiny is this group entitled to when a statute disadvantages them, it asks, is the differentiation made, the disadvantage made reasonable in light of a valid governmental purpose?" Id. at 141. As Judge Bork explained his test a day earlier in response to a question from Senator DeConcini: "A reasonable basis test allows a little more play in the joints, I think, for the Court to listen to the legislatures and look at the society and bring evidence in and so forth." Transcript at 76 (Sept. 16, 1987).

The primary problem with Judge Bork's reasonable basis test is that it sounds similar if not identical to the reasonable basis test used previously to deny equal protection of the laws to racial minorities, to women, and to other vulnerable individuals. Compare, for example, the following application by eight Supreme Court Justices of the reasonable basis test to the enforced segregation of blacks:

> So far, then, as a conflict with the fourteenth amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say [this law] is unreasonable, or ... obnoxious to the fourteenth amendment.

Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896) (brackets and ellipsis added).

Women have fared no better under the reasonable basis test. In Bradwell v. Illinois, 83 U.S. 130 (1873), the Court found it reasonable for women to be excluded from the practice of law. In Radice v. New York, 264 U.S. 293, 294 (1924), the Court upheld a law barring women from late-evening restaurant employment as not "unreasonable." And, as recently as 1961, all nine Justices found the exclusion of women from mandatory jury service to be a "reasonable classification." Hoyt v. Florida, 368 U.S. 57, 61 (1961).

A second problem with Judge Bork's reasonable basis test is its subjectivity. For example, although Judge Bork testified that "it is irrational to make a distinction between persons on racial grounds, utterly irrational," Transcript at 75 (Sept. 16, 1987), other judges, even Justices, may believe that it is entirely reasonable to make racial distinctions for affirmative action purposes so as to create, for example, a diverse student enrollment beneficial to all students in view of our country's racial and cultural diversity, see Regents of the University of California v. Bakke, 433 U.S. 265 (1978).

And although Judge Bork is confident that he "know[s] that for some purposes it is rational, reasonable to make a distinction between the genders, between the sexes," Transcript at 75 (Sept. 16, 1987) (brackets added), he never explained which purposes; and he never differentiated between what he considers as unreasonable discrimination against women and what he believes to be reasonable discrimination against women. And, with regard to those instances of gender discrimination and sexual harassment that Judge Bork believes to be reasonable, rest assured that other reasonable persons may find his beliefs unreasonable, see Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985) (three-judge panel finding sexual harassment), reh'g en banc denied, 760 F.2d

1330 (D.C. Cir. 1985) (Bork dissenting from rehearing en banc and finding no sexual harassment), aff'd sub nom., Meritor Savings v. Vinson, 106 S.Ct. 2399 (1986) (unanimous decision finding illegal sexual harassment).

It is difficult at best to understand why Judge Bork would announce (for the first time at his confirmation hearings) his rejection of the settled constitutional standards which were adopted to provide meaningful equal protection for racial minorities, for women, and for other vulnerable individuals who in fact had been given little or no equal protection in the past under the lenient reasonable basis test. It is equally puzzling why Judge Bork would announce as his test a subjective reasonable basis test seemingly similar to and maybe identical to the reasonable basis test that for so long denied equal protection of the laws to racial minorities and to women.

Although it is of course acceptable for a judge to change his views, confirmation conversions should be closely questioned. It is not acceptable, however, for a Supreme Court nominee to announce his opposition to settled constitutional standards which protect the rights of racial minorities and women. And just as it was wrong to apply a reasonable basis test in Plessy, it is wrong to propose readoption of a singular reasonable basis test today.

3. Judge Bork's Disagreement With Bolling v. Sharpe Could Lead to Little or No Constitutional Protection From Discrimination by the Federal Government Against Racial Minorities and Women.

Although the Supreme Court's unanimous decision in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), is not consistent with Judge Bork's originalist principles, Judge Bork has not attacked Brown in his writings nor did he disagree with it in his testimony before this Committee.

Judge Bork, however, did disagree with the Supreme Court's unanimous decision in the companion case of Bolling v. Sharpe, 347 U.S. 497 (1954), in which the Court struck down school segregation in the District of Columbia as unconstitutional under the Fifth Amendment's due process clause. The Court in this case could not rely -- as in Brown -- on the Fourteenth Amendment's guarantee of equal protection because the Fourteenth Amendment applies only to the states, and the District of Columbia is not a state. Relying instead upon the liberty interest inherent in substantive due process, the Court unanimously recognized the unfairness of discrimination and thereby held "that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution." Bolling, 347 U.S. at 500.

As an opponent of substantive due process, Judge Bork disagreed with the unanimous decision in Bolling in his testimony before this Committee. For example, in response to questions from Senator Specter, Judge Bork stated that "constitutionally that is a troubling case," Transcript at 150 (Sept. 16, 1987); "I did not accept it," id. at 151; and "I have not thought of a rationale for it," id. at 152.

Judge Bork stated thereafter that he nevertheless would not overrule it: "My doubts about the substantive due process of *Bolling v. Sharpe* does not mean that I would ever dream of overruling *Bolling v. Sharpe*." *Id*. at 154. He added: "And furthermore I should make it clear, as I have said repeatedly, segregation is not only unlawful but immoral." *Id*.

What remains unclear, however, is how Judge Bork would have voted in *Bolling* had he been given the opportunity to do so. Also unclear is how he might have voted in cases applying the *Bolling* decision in other areas of discrimination, and how he might vote in similar cases hereafter (if he were elevated to the Supreme Court) in view of his opposition to the inclusion of liberty as part of substantive due process.

The liberty principle applied in *Bolling* has not been limited only to striking down federal school segregation. In the area of race discrimination, it has also been applied to strike down and to remedy federal contributions to segregated public housing. *Hills v. Gautreaux*, 425 U.S. 284 (1976).

The *Bolling* liberty principle has also been applied to gender discrimination practiced by the federal government. For example, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Supreme Court ruled on an 8-1 vote that it was a violation of the Fifth Amendment's due process clause to place greater burdens on servicewomen than on servicemen in obtaining dependents' medical and dental benefits.

Although the *Bolling* liberty principle is established constitutional doctrine, it is contrary to Judge Bork's originalist principles and thereby unlikely to gain his recognition, much less his support. This is not to say that Judge Bork would personally approve of racial and gender discrimination by the federal government; he just would not be able to find such discrimination unconstitutional. And, as Judge Bork pointed out to Senator Specter: "If they [the people] do not like what I am doing with respect to liberty, they have no recourse." Transcript at 229 (Sept. 18, 1987).

CONCLUSION

Millions of Americans -- who are not legal scholars -- care deeply about the task before you. They care not because of concern about Judge Bork's intellect or his knowledge of legal precedent. They care because the Supreme Court affects their lives -- our lives -- as much as any other institution on this earth. We do not need a Supreme Court Justice who relishes this appointment as an "intellectual feast." Transcript at 99 (Sept. 19, 1987). We want -- and need -- a judge to whom we can turn with confidence, as Justice O'Connor so aptly phrased it, "when we seek that which we want most from our government: equal justice under the law."

Senator KENNEDY. You've expressed the view which I think has to be of concern to the members of this committee and to the Senate, and most importantly to the country, about whether we want to risk going back, refighting old battles, reopening old wounds, or going back to a different period in our time.

You mentioned and listed some of the areas in which Judge Bork had taken positions which would have denied in a very significant way the march towards progress which you have been so much a part of—his position in support of poll taxes, his opposition to one man, one vote; his support in terms of racially restrictive covenants; and denial of the Senate's authority and power to strike down the discrimination in public accommodations and in the areas of literacy tests.

And I think you've given us a powerful lesson in terms of the judge's criteria or tests that he would use in protecting the rights of women and others in our society, such as the handicapped.

And you've heard him speak of the reasonableness test and how he believes that he can come out about where the Supreme Court is today in the intermediate scrutiny test which they use today in their consideration of discrimination against women in our society.

How much weight do you think that we should give to that conclusion? Do you believe that there is, given his strong position, that has been well stated in commentary after commentary, that the equal protection clause does not apply really to women. Now, he's stated other positions before the committee and indicated he used a reasonableness test and thinks that he may very well be able to be in the mainstream in terms of what the Supreme Court has overwhelmingly stated as the rights to women, and I'd like to believe that that's a continuing, on-going process.

How much confidence should women, minorities, have in his stated position before this committee? We've considered the past, but let's just focus on the present and what he testified before this committee.

What can you say as an attorney, as a lawyer, about what the outcome would be if his position was the majority position?

Ms. MARTINEZ. As you pointed out, and more importantly as a practitioner of equal protection law and other kinds of law is where my concern comes in, as Senator Specter pointed out, equal protection was applied to Chinese Americans in the *Koramatsu* case, and yet in 1947 it wasn't applied to Mexican Americans.

It wasn't until *Hernandez* v. *Texas* came in that we were able to find that equal protection covered Mexican Americans in *Hernandez* v. *Texas.* If one looks carefully at the test announced by Judge Bork, the reasonable basis test for examining these various things that might be considered unconstitutional, one can see a great deal of trouble, and I urge you to read and I hope you will make part of your record my written presentation.

Senator KENNEDY. It will be made a part of the record in its entirety.

Ms. MARTINEZ. In which I quote from *Plessy* v. *Ferguson. Plessy* v. *Ferguson* used a reasonable basis test. It said: "so far then as the conflict with the 14th amendment is concerned the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation and with respect to this, there must necessarily be a large discretion on the part of a legislature in determining the question of reasonableness. It is at liberty with that with reference to the established usages, customs and traditions of the people with a view to the promotion of their comfort and the preservation of the public peace and good order. Gauged by this standard, we cannot say this law, mandating the segregation of children of a white and colored races is unreasonable or obnoxious to the 14th amendment." I, for one, hope we do not go back to that.

Senator KENNEDY. My time is up, Mr. Chairman.

The CHAIRMAN. The Senator from Wyoming.

Senator SIMPSON. Well, nice to see you again.

Ms. MARTINEZ. It's nice to see you, Senator.

Senator SIMPSON. We had some interesting times together with regard to the issue of illegal immigration and I came to know you very well, and I have great admiration for the spirited way you do your work and pursue the things that you deeply believe in.

Ms. MARTINEZ. Thank you so much.

Senator SIMPSON. I share exactly the sentiments of Senator Kennedy about you as a person and you have fought the battles, and it was a great pleasure to get to know you better as we grappled with that tough national issue and hope that it works.

We'll assure that discrimination does not take place in the country, and that's one of the things we've built into the legislation and we will pursue that.

But—I'm not going to say "but" and then say some really nasty things. I'm not going to do that because all everybody has ever talked about Bork so far has said "but", and then they really hammer him flat. They just peel the scorched earth policy out of the old back and there they go. And it really is, I think, something to be very wary about.

But you related some of the things you have fought for over the years, dedicated your life to by litigation, and it's been very successful, some key cases in fighting for the lesser and then the disenfranchised, and the irony is as we talk about risking and rerunning old battles and opening old wounds and old scars, and those are phrases used, those did not come through the pro-Bork people.

The specter of these things has come about by the anti-Bork people, black versus white. The list is so extraordinary that I'm saving it. It's sterilization and union busting and lunch counters and no protection for women and turning back the clock and anti-semitism and insensitivity to religious minorities and sexual harassment of women and poll taxes to prohibit blacks when the case didn't have anything to do with that, and Nixon's firing of Cox, and cameras in the bedroom, and no right of privacy, and overturning the Civil Rights Act of 1964, and restrictive covenants in deeds.

If I read all that stuff just flowing out of here, and it's cranked out of here by the metric ton, I'd be terrified by this man.

Yet not one percent has said anything to challenge the extraordinary abilities of the man. And so you have worked in this area so long and so hard, and yet as Solicitor General and as an appellate court judge, Judge Bork has never advocated or issued a judicial opinion that has been less sympathetic to the substantive civil rights of minority or female plaintiffs than the position taken by the entire Supreme Court or by Justice Powell, who is continually held up in this procedure as the swing vote, and thus, if Bork were to take his place, I guess then he would be, obviously, the swing vote, which terrorizes people, it removes the balance on the Court.

I think it discloses a pervasive ability of Justice Bork to pervert and distort, and cajole four of his fellow Supreme Court judges, which is—if he is that bad—what he is going to do.

But let me ask you, because you do follow these cases and you are a superb lawyer: were you aware that, as a judge on the Court of Appeals for this District of Columbia Circuit—and what a court it is. There are some very extraordinary people on it.

Ms. **Martinez**. Absolutely.

Senator **Simpson**. Democrat and Republican, men and women——

Ms. **Martinez**. Agreed.

Senator **Simpson**. It covers the full spectrum of philosophy, and they do some beautiful judicial work.

Judge Bork has consistently vindicated the civil rights of all the parties before him during his tenure on this court, on the court he sits.

He has ruled for minorities or women, raising a substantive civil rights claim. He has ruled for them seven out of eight times, and while Solicitor General of the United States, in 20 substantive civil-rights cases, in eighteen of those twenty, Judge Bork argued in support of the civil-rights plaintiff or the minority interest, and in fact the NAACP Legal Defense Fund sided with Judge Bork in 9 of its 10 civil-rights briefs in cases in which the court made a substantive interpretation of federal statutory or constitutional law.

And of all the judges, it was Justice William Brennan who sided with Judge Bork most of the time.

Now, those are facts, and did those have any bearing on you as a thoughtful, conscientious lawyer who is trying to examine a case from both sides, and deal with it honestly and up front, and without emotion, fear, guilt, or racism?

Ms. **Martinez**. Yes. That does have a bearing on me. I have looked at that. I have thought about it, and I would like to share with you how it looks to me, and why I still come out where I do.

In looking at the cases that he has decided as a court of appeals judge involving minorities, women, these have not been necessarily, as you know, Senator, constitutional cases.

Many of them have been statutory cases, not very difficult to decide all sorts of issues. In looking at his role as our Solicitor General, I have looked at the positions there, too, but of course, as a practitioner, I understand keenly that it was precisely his job to represent his client, the U.S. Government, which was asking him to take these positions.

And as you know, and I know that—and on occasion he has expressed his personal disagreement with some of the decisions he argued on behalf of his client, the U.S. Government, in the *Usery* case.

As a thinking lawyer, as someone who might even appear before Judge Bork some day, I have had to think about all of this, and why do I still conclude that I want to ask you not to confirm him? I have thought about it, and I think, ultimately, it comes down to questions of judgment, of temperament, and of trust.

And in looking at Judge Bork's temperament, as best I can see it—I do not know him personally—but from his writings, from his analysis, I find it wanting.

He does not just disagree with *Oregon* v. *Mitchell*. It is "pernicious constitutional law." The judgment he reaches about literacy tests is a strong one, and he still says, "But I really have not had occasion to look at how literacy tests operate."

He says, "The poll tax was only $1.50 poll tax." He does not look at precisely how Virginia imposed that $1.50 and what the impact might be on someone less fortunate than he is.

And it is that quality of his that troubles me. I suppose it comes down to the fact that, in my view, he has too cramped a view of equal protection, and he is too quick to form an uniformed view of what equal protection might mean for the day to day reality that so many Americans live, and will in the future live. So that for those reasons, and certainly taking into account this man's distinguished public service, I have reluctantly concluded that I want to ask you not to confirm him.

Senator SIMPSON. I thank you, and I just want to add one dimension. That in the amicus briefs that he filed, he was not always representing the United States as a party.

He testified here, and the record is clear, that he personally made the decision to get into some of those cases on the side of the minority claimant. He could have stayed out.

That was a very important thing that he testified to, and I thank you, Mr. Chairman, and nice to see you, Vilma.

Ms. MARTINEZ. Thank you.

The CHAIRMAN. Thank you. The Senator from Alabama.

Senator HEFLIN. You mentioned the Virginia poll tax case and the writings pertaining to that, and I think you brought out the fact that there was this matter of having to own personal property or real property in order to be on a mailing list, and that otherwise, you would not have any notification.

Judge Bork has been rather emphatic, that the issue of race was not involved in the Virginia poll-tax case before the Supreme Court. That there was no allegation of that.

Assuming that is correct, does he base his rationale on the poor and their inability to pay. This would not indicate, would it, that he would believe that a poor person could be discriminated against, or that the equal protection of the laws did not apply to a poor person.

From what you have seen, would you give us your evaluation of his explanation pertaining to his writings or pertaining to the Virginia poll-tax case.

Ms. MARTINEZ. As I understood his statements about the *Harper* v. *Virginia* poll-tax case, they basically were that it was such a small amount of money, that he did not see how it could have a discriminatory impact based on economics.

He has said that in his view it was not a race case, and——

Senator HEFLIN. Now when was that decision rendered? Do you remember, offhand? The early 1960's?

Ms. MARTINEZ. I think it was 1966.

Senator HEFLIN. 1966?

Ms. MARTINEZ. I think it was 1966.

Senator **Heflin**. And the nominal aspect of the money is his explanation?

Ms. **Martinez**. Yes. That is my understanding of it. He said it was a very small poll tax, is the way he has described it.

Senator **Heflin**. 1966 dollar evaluation as compared to today still would probably be in the neighborhood of—inflation added to it—about $5 or something, or maybe $4, something like that, wouldn't it?

Ms. **Martinez**. I think it——

Senator **Heflin**. In other words, he did not criticize it on the basis of Constitution, but only on the nominal amount of the money of the poll tax?

Ms. **Martinez**. That is my understanding, and that is what troubles me about his criticism of *Harper*, because I think it overlooks, as I have put it, overlooks how this nominal amount, what impact that nominal amount has on Americans not as privileged as he.

Senator **Heflin**. Well, that is also a matter of concern—I am sure—to members of this committee.

Ms. **Martinez**. Oh, yes.

Senator **Heflin**. I mean, you have got the issue of not only the amount of money, but the past payment of 3 years, having had to pay it within 3 years. Anybody that is from the South knows that you can go back into the history of the Constitutional Conventions following Reconstruction days, and it is very clear that the language of the debates in those Constitutional Conventions was disenfranchising of the blacks.

Ms. **Martinez**. Absolutely, and as you probably know, Senator, in the *Harper* opinion at footnote three, there is a statement that the Virginia poll tax was born of a desire to disenfranchise the Negro.

So that although the case was not decided on those grounds, certainly any student of history would recognize that the poll taxes were designed to disenfranchise blacks.

And as you also know, I am sure, poll-tax laws were struck down that same year in Alabama, and my home State of Texas.

The **Chairman**. Senator Specter.

Senator **Specter**. Thank you, Mr. Chairman.

Ms. Martinez, I join my colleagues in applauding your work, and thank you for coming here.

Ms. **Martinez**. Thank you.

Senator **Specter**. You talked about the equal protection clause and the standard for application, and you described I think Justice Stevens' standard.

And my question to you turns on what Judge Bork has said he would do by way of following Justice Stevens' standard on equal protection. Do you think that Justice Stevens' standard has been an adequate one for appropriate scrutiny on the equal protection line?

Ms. **Martinez**. No. I think that we have taken a very long time to get to the view of heightened scrutiny on women's issues and strict scrutiny on race issues. Those standards seem to be working.

Justice Stevens talks of a reasonable basis scrutiny, but the reasonable person viewing it being the discriminated against person, himself or herself, not any reasonable person.

As best I can tell about Judge Bork, I do not know whether he would go strictly by Stevens 'reasonable view, or he has a slightly looser reasonable basis standard than Justice Stevens has articulated.

But whichever one it may be, personally, I am concerned that neither the Justice Stevens' standard nor perhaps the loosened Judge Bork standard would work to ensure what I call that most elusive birth right to equal protection under the law.

And as you know, as a lawyer, a scholar yourself, that *Bolling* v. *Sharpe* is the case which said that segregation in the schools here in the District of Columbia was unconstitutional, and that was decided under the due-process provision of the fifth amendment.

Judge Bork takes some issue with that approach, and so I just think that he gives so much flexibility to the issue of deciding what is reasonable and what is not reasonable, that I do not feel we would be protected.

Senator SPECTER. Well, Judge Bork said that he agreed with the conclusion of the court in *Bolling* v. *Sharpe*.

Ms. MARTINEZ. With the conclusion.

Senator SPECTER. He thought that the desegregation order was appropriate in that case.

Ms. MARTINEZ. Right.

Senator SPECTER. Are you satisfied, generally, with the way the Court is interpreting the equal protection clause today?

Ms. MARTINEZ. I would have to say that yes, I think they are on the right track, but I think there are still so many undecided cases, and when I sit back and look at how Judge Bork approaches issues, it troubles me.

Senator SPECTER. Do you think that Judge Bork would upset the—do you have something to continue there? Go ahead.

Ms. MARTINEZ. Yes. There was something I—there was an example I wanted to cite to you, if I may.

In talking about the *Craig* v. *Boren* case, Judge Bork has suggested that these issues about male-female, and drinking of beer trivializes the Constitution, and he said after all, there are statistical differences between men and women.

The thrust of the analysis has not been that gross, that big. It has been more fine-tuned: that you have to look at the particular person, not that women tend to be smaller and weigh less, but whether this particular woman who says she wants to do this particular job can do it.

And these are the troublesome problems that I have with Judge Bork.

Senator SPECTER. The question that I was about to ask you was whether you thought Judge Bork would upset the balance or the current trend of the Court on equal protection. There has been that concern raised on the privacy issue, but I do not know that that concern has been raised on equal protection, if the Court seems to be reasonably harmonious in their conclusions.

There are a great many concurring opinions. There were seven of them in *Craig* v. *Boren*, the case that you mentioned, but they get to the same result. They define the standard somewhat differently, so that there is a real issue as to whether Judge Bork would upset any balance which now exists, and as you describe it, generally satisfied with where the Court is on equal protection.

Ms. **Martinez**. But I think he could upset that balance because there are still cases that are decided, not unanimously of course. Look at the *Bakke* case, for example, the affirmative-action case.

And Judge Bork has given this committee no guidance on what he would do in the affirmative-action arena, saying that those sorts of issues could come to him regardless of what court he might sit on in the future. So I have that concern as well.

Senator **Specter**. I regret that we do not have more time to discuss these issues, they are very important and very deep, but my time is up and we thank you very much for coming.

Ms. **Martinez**. Thank you, Senator.

The **Chairman**. Thank you. Ms. Martinez, I am only going to take a few minutes of my 5 minutes.

The poll-tax cases. If I understand what you are saying, that not only is the constitutional issue of the constitutionality of a poll tax, under any circumstances, something that you wonder about Judge Bork's concluding, but that at a minimum, as I understand you, you are saying that his comments before this committee, and his comments prior to coming before this committee, demonstrate an insensitivity to what is reasonable and unreasonable in terms of encouraging or discouraging people to vote.

We know from experience in my State, which was segregated by law, the mere fact that people had to go to a certain courthouse as opposed to being able to register in their communities, has a dampening impact upon their willingness to participate because they associate so many things with certain courthouses. They are the same courthouses they were dragged to 20 years earlier, or 30 years earlier.

We also know that, in my State, and other States that were segregated by law, that anything that makes it more difficult for people to register to vote has a more profound impact upon minorities who already wonder whether or not they are welcomed in the process.

I just spent a couple days down in the valley in Texas. I walk through homes. It is beyond my comprehension that people can live there. They are neat and they are clean because the people have such pride. No running water, no toilet facilities, no ability to have anything but canned foods, and sometimes not then. And I do not know what Judge Bork thinks or my colleagues think, but it is hard enough to get those folks to believe that there is a reason to vote in the first place. If on top of that you tell them you got to pay $5 to do it, I do not know how any reasonable man or woman could not conclude that that would have, at a minimum, a dampening impact—although the poll tax at the time was a dollar or a dollar fifty; today that would be $5 or thereabouts.

How anyone could not understand that that would diminish, at a minimum diminish, participation of minority groups is beyond me. I guess that is more in the line of a Hatch statement than a question. We all are making statements a lot these days as we wind down.

Is that part of your concern, or am I putting words in your mouth?

Ms. MARTINEZ. No, that is precisely part of my concern, and you phrased it much better than I possibly could.

I have not used the word "insensitive" because it is just so value-laden. But what I have said is that unfortunately Judge Bork has, first, too cramped a view of what equal protection requires; and too uninformed a view not to know, as most people did, that these poll tax laws were passed to disenfranchise blacks, not to know that $1.50 in 1966 or $5 today will keep a person from exercising the birthright, the fundamental right of voting, is not the sort of person that I can repose my trust and confidence in to decide equal protection issues.

The CHAIRMAN. Not necessarily because that person is mean-spirited?

Ms. MARTINEZ. No.

The CHAIRMAN. Not because that person has a prejudiced bone in his or her body?

Ms. MARTINEZ. No.

The CHAIRMAN. Because that person just may not know what the real world is like?

Ms. MARTINEZ. That is my worry.

The CHAIRMAN. One of the reasons why, when I was asked prior to any nominee being sent up—and I was asked what type of nominee; I cannot choose the nominee nor is it my right to choose the nominee—I indicated that I really think we are becoming awfully thin on the Court on practitioners.

Ms. MARTINEZ. I am happy to hear you say this.

The CHAIRMAN. I am serious. One of the reasons why I had such great respect for Justice Powell, even though I disagreed with him from time to time, was that he was a practitioner in the real world, a pragmatist who understood how it worked. Intellectuals are wonderful on the Court. But I do not want the Court made up of nine intellectuals who have not been out there in the hurly-burly of the world and been involved. Not that Judge Bork has not been so involved. He has had tragedy in his life, and he has had difficulties, and he has overcome them and dealt with them with great class and sensitivity.

But it seems to me that it is important that people know. I will just conclude by suggesting that we had a case with a nominee for a much less significant position a year or so ago, and it related to his unwillingness to understand that if the only place blacks could register in a certain State was a place where they had to walk over a bridge and to a courthouse where they used to have to go to the basement, that it was not surprising that older blacks would be afraid to or intimidated to go there.

I think knowing those kinds of things is important for a Supreme Court Justice.

At any rate, I am over my time. I yield to my colleague from Iowa, and then what we will do is we will break until 2:00 o'clock or thereabouts for the next panel of witnesses.

Senator GRASSLEY. Thank you, Mr. Chairman.

I believe that you hinted that Judge Bork gave no guidance on his affirmative action reasoning. Maybe I can get you to give me some of your views on this very tough issue.

Judge Bork's opponents have criticized him for his opposition to affirmative action for minorities, although we have also heard testimony that it would be a mistake for us to conclude that his mind is made up on this issue. I would like to ask you a question about this subject. I would like to have you think of a Supreme Court Justice, how you think he might and should go about deciding a hypothetical affirmative action case. And, remember, Judge Bork was asked a lot of hypothetical cases that he had to respond to.

Suppose that a company has one position open in its senior management, and the only two applicants are a black male and a white female of equal qualifications. Let us assume that the company has met its goals for promoting women but not for blacks. So the company decides to promote the black male in order to fill its quote of black promotions. The woman sues alleging that she had been discriminated against on the basis of race and sex.

In your view, would the ideal Supreme Court Justice rule in favor of the woman and against the black male?

The CHAIRMAN. You will be graded on this.

Ms. MARTINEZ. Well, first of all, you know, I take issue with one of the statements you made that the company is filling its quotas. Unless——

Senator GRASSLEY. That is what I did say. But in this particular case, you know, when there is——

Ms. MARTINEZ. As the Senator knows, in certain cases courts have allowed quotas where there has been a judicial finding of present impacts of past discrimination. Courts have approved the use of quotas.

Senator GRASSLEY. Yes.

Ms. MARTINEZ. So that I suppose in that case that is sort of the easy case. They have already filled the quota, and they have more leeway. And assuming these are equally qualified persons——

Senator GRASSLEY. Well, that is what I said.

Ms. MARTINEZ. I assume that was part of your hypothetical.

Senator GRASSLEY. Yes.

Ms. MARTINEZ. I do not see a difficulty with making that selection.

Senator GRASSLEY. Then you are saying that they would find, that that ideal Supreme Court Justice would find in the favor of the woman over the black male?

Ms. MARTINEZ. No, over the black male is what I am saying; that there would not be a discrimination against her. They were both equally qualified. There was presumably, according to your fact pattern, a quota system in place after a judicial finding which had been met.

Senator GRASSLEY. Well, under the theory of affirmative action, is it not possible that black males one day will be required to give up the gains that they made in favor of women who comprise a much higher percentage of the populace, all involved with seeking to achieve proportional representation in the workplace on the basis of sex?

Ms. MARTINEZ. Under the theory of affirmative action, we will eventually be able to do without race-conscious policies. That is the hope.

Senator GRASSLEY. Well, true.

Ms. MARTINEZ. That the society will reach a point——

Senator GRASSLEY. I am not going to find any fault with that. I am asking you based on where we are today and based upon the situations we find ourselves in today.

Ms. MARTINEZ. I am sorry to say that where we are today is in a situation where we still have tremendous segregation of Mexican-American school children in the Southwest, in my home town of Los Angeles, in the valley that the Senator spoke about, and we do not have equal educational opportunities for these children, unfortunately, so that we do not yet have the kind of America that can overlook and ignore affirmative action plans and programs as a way of bringing in people who have been disadvantaged in the past.

Senator GRASSLEY. And that gets me exactly back to the point I am asking you about. Under this process that we are in, is it not possible that black males one day will be required to give up the gains that they have made in favor of women because women comprise a much higher percentage of the populace, as long as we are trying to seek proportional representation in the work force based on sex?

Ms. MARTINEZ. I would dispute that we are trying to seek proportional representation based on sex. We are trying to reach an ideal where everyone will look at everyone regardless of race, creed, color, sex, et cetera. We are not there quite yet.

Senator GRASSLEY. You know, I wish that people that approach this issue were as reasonable as your statement. But we find people that are arguing quite the opposite and holding it against Judge Bork because of the views that he holds on exactly how to get to that ideal point that you just stated that you are hoping for.

I have no more questions.

The CHAIRMAN. Thank you.

Before we adjourn, I would like to read a letter to the committee that I received that I have made available to the committee. The letter reads as follows:

> To Senator Joseph Biden: During the hearings being conducted by the Senate Judiciary Committee on the nomination of Judge Bork, some prominent lawyers who served in my administration have testified in favor of his confirmation. Just to avoid any misunderstanding, I would like for the members of your committee to know that I am strongly opposed to Judge Bork's confirmation as an Associate Justice of the Supreme Court of the United States.
>
> Like many other interested Americans, I have reviewed some of the key judicial rulings and scholarly papers of Judge Bork on the most significant and often controversial issues of our time, and I find many of his forcefully expressed opinions in contradiction to my concept of what this nation is and ought to be. He has almost invariably sided with the most powerful and authoritarian litigant in the cases before him. This has been particularly troubling in his rulings that government forces have an extraordinary legal right to intrude on the privacy of individuals, a notion that has always been strongly opposed in our section of the country.
>
> Furthermore, as a Southerner who has observed personally the long and difficult years of the struggle for civil rights for black and other minority peoples, I find Judge Bork's impressively consistent opinions to be particularly obnoxious. I remember vividly the judicial debates concerning public accommodations, the poll tax, and affirmative action. Along with most other people in the South, I have appreciated the wisdom and courage of lawyers and judges who finally prevailed on those issues in order to eliminate legally condoned racism in our country. It is of deep concern to me that Judge Bork took public positions in opposition to these advances in freedom for our minority citizens.

Only recently, with the vision of a seat on the Supreme Court providing some new enlightenment, has Judge Bork attempted to renounce some of his more radical writings and rulings. It seems obvious that, once confirmed, these lifelong attitudes that he has so frequently expressed would once again assert themselves on the Court and have a deleterious effect on future decisions involving personal freedom, justice for the deprived, and basic human rights.

I urge you and other Senators to reject this nomination. Sincerely, Jimmy Carter.

Addressed to the Judiciary Committee.

The hearing will adjourn until 2:15 p.m. Our first witness will be Rabbi William Handler, and then our next panel will be made up of John Clay and John C. Roberts.

[Whereupon, at 1:19 p.m., the committee recessed, to reconvene at 2:15 p.m., the same day.]

AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order. I apologize for the late start but we were voting on the floor.

Our next witness is a very distinguished witness, Rabbi William Handler, the Union of Orthodox Rabbis of the United States and Canada.

Rabbi, welcome. I appreciate your indulgence, and please begin at any pace you would like.

Rabbi HANDLER. Thank you, Mr. Chairman. I am Rabbi William Handler, representing the Union of Orthodox Rabbis——

The CHAIRMAN. Excuse me. I am sorry, I forgot to swear you in. Would you please stand to be sworn.

Do you swear that the testimony you are about to give will be the whole truth and nothing but the truth, so help you God?

Rabbi HANDLER. I affirm.

The CHAIRMAN. Please proceed, Rabbi. Thank you.

TESTIMONY OF RABBI WILLIAM HANDLER

Rabbi **Handler**. Mr. Chairman, I am Rabbi William Handler representing the Union of Orthodox Rabbis of the United States and Canada, this country's oldest rabbinical organization founded in 1900, representing over 600 rabbis and deans of Talmudic schools and seminaries, which serve over half a million Orthodox Jews in the United States and Canada.

Before I begin, Mr. Chairman—[prayer in Hebrew].

Mr. Chairman, I would like to discuss something that has made me very angry about the way in which your staff has conducted this hearing, and my appearance here today.

Before I begin, I received two telephone calls yesterday from a Melissa Nolan. The first call asked me my name, and the organization I represent.

The **Chairman**. I beg your pardon? She mispronounced——

Rabbi **Handler**. No, no. She asked me my name——

The **Chairman**. Oh, I am sorry.

Rabbi **Handler** [continuing]. And the organization I represent. Half an hour later she called me and asked me, and told me that I am to be here; I am going to be on the—I think she said the fourth panel. I am to be here today. She told me where to come and what time to appear.

About an hour after that time, I received a call from the executive director of our organization, Rabbi Hirsh Ginzburg, telling me that your——

Senator **Thurmond**. If you do not mind, speak into your microphone a little closer.

Rabbi **Handler**. I am sorry. Rabbi Ginzburg told me that he had received a call from your top aide, Diana Huffman, explaining to him that due to a change in procedure I was not to appear today; there will not be any outside witnesses today; and I should submit a memorandum to the address which she gave Rabbi Ginzburg, and they will publicize it at some later date.

We had spent a lot of time trying to get into this hearing and to make our views known, and to speak as citizens of this great country which extends freedom of speech to all of its citizens—even to those who are religious.

We are not second-class citizens. For this kind of shabby trick to be played on a reputable Jewish organization, to try to censor our views by telling us, falsely, a person in top authority controlling the appearances before this committee, knowing full well that she was lying, telling my executive director that I am not to appear because of policy considerations, that is the most ugly thing I have ever seen in my life.

I think, as a responsible chairman of a committee, an important committee that can decide the future of this country, you should fire your top aide for doing that, if you can confirm that that happened.

And I can say it, and Rabbi Ginzburg will be glad to tell you that, because he does not know who Diana Huffman is. He is very, very unknowledgeable. He did not get that name from the air.

The **Chairman**. Well, I thank you very much. We will look into it. You are here. You are welcome. Now please testify.

Rabbi **Handler**. Thank you, Mr. Chairman.

The **Chairman**. Within 5 minutes, please.

Rabbi **Handler**. Our organization is a rabbinical organization, and we ordinarily do not make political endorsements. However, in this case we are going to follow the example of the Agudath Israel, which publicized its memorandum to all of the Senators of this Committee, endorsing Robert Bork for the nomination to the Supreme Court, based on the fact that he is not hostile to religion, as so many Supreme Court Justices have become lately, and he is willing to treat us as equal citizens with all other people in this great country. (See Figure 1.)

Also because he is a person who understands the necessity for a virtuous, decent citizenry, and we feel comfortable that he will extend equal rights to all citizens, and that we will be able to have a good relationship with him in our dealings with the Government.

I would also like to publicize the editorial in the "Jewish Press" which is also rather unusual, endorsing Robert Bork. The "Jewish Press" is the largest independent Jewish daily in the United States of America. (See Figure 2.) This reflects a very wide consensus in the Jewish community among traditional religious Jews in favor of this nomination.

We are speaking about a Supreme Court nomination, and we should look a little bit into the Constitution which the Supreme Court administers. The framers who put together the Constitution had a very specific idea of what kind of people they made this Constitution for. They stated it clearly in the—their ideas, in the Declaration of Independence, at the convention, the Constitutional Convention. George Washington, in his Farewell Address, made it very clear, he looked to a virtuous citizenry that would regulate itself based on religious principle derived from the Bible.

Because only in that way could they be free, and not have to impose strong restraints and police powers on them, because if they would not be self-disciplined, they would require a very strong police state.

The belief in God was very clear. They believed that there would be a multi-denominational establishment of church in this country, and that there would be freedom of religion, not freedom from religion. (See Figure 3.)

And this multi-denominational pluralism would result in a civil religion which everybody could deal with on a consensus basis, and the consensus could be widened, as needed, as it has been to include the Quakers, and right now they are talking about Black Muslims, and others. Anybody who does not threaten the stability of the country.

It is clear, and they felt it was clear, that if the people did not remain virtuous, the country would not be able to maintain itself on a constitutional basis, and it would have to go totalitarian.

Recent Supreme Court decisions have actively undermined this understanding of the framers of the Constitution, and recent decisions in the area of prayer, criminal rights, pro-abortion, liberalized pornography, have shown that the judges of the Supreme Court do not respect the original intent of the framers, which included the motto "In God We Trust" on the coinage; chaplains; the

Supreme Court itself opens its proceedings with the words: "God save the United States and this Honorable Court." (See Figure 4.)

But the people who sit there do not believe that that really has a place. I think they should abolish that if they really believe that.

Decent moral parents, as a result, especially single-parent families, find it very difficult to raise children in this inhospitable super-secular atmosphere that has been created as a result of the Supreme Court extreme separation of church and State which was never intended. (See Figure 5.)

We endorse Robert Bork because he understands what the framers meant. He respects it. (See Figure 6.) He does not want the police state, and that is why he wants to have a certain modicum of civility in our public life, a certain civil consensus idea of religion, and people who do not believe in God are best protected that way.

Because if nobody believes in anything, what rights has anybody got?

Therefore, Mr. Chairman, we urge you very strongly to affirm the nomination of Robert Bork to the Supreme Court. Let us elevate Robert Bork, to have some long overdue honesty and common sense, which he has demonstrated in the interpretation of our basic law, to avoid legislation by a body that is not a legislative body, and to let you do the legislating, Mr. Chairman, based on a consensus of the people and what the people want you to do.

If we want amendments to the Constitution, we should not impose them by "gut reaction," as Mr. William O. Douglas has said he does when he decides a case.

Let us have amendments by a consensus of the people. If we do not like religion, let us make an amendment. "Religion will be forbidden in public." Now let's put it on the table. Let's not try to sneak in the back door.

If we continue the biblically-based traditions of our Founding Fathers we shall earn the continued blessing of God Almighty, and God Bless America.

The CHAIRMAN. Thank you, Rabbi.

I want you to know I apologize for any confusion. You are always welcome here, and we welcome your statement.

I have only one very brief question for you.

How do you know that Robert Bork disagrees with the Supreme Court on matters of religion? I assume that you mean prayer in school, and public utterances of religious activities.

How do you know he disagrees with a Court that you feel has become overly secular?

Rabbi HANDLER. That is a good question, Mr. Chairman, and I will reply by saying that, in my opinion, the reason that the Court in recent times has taken the turn it has, away from the original intent of the framers, is precisely because we have become a secularized society.

I have submitted to this committee a speech by Professor Peter Berger of Rutgers University, the foremost professor of religion in this country.

The CHAIRMAN. We will put the entire speech in the record, as if read. (See Figure 7.)

Rabbi **Handler**. Well, he has made a speech and what he says, basically, is this. That in the secular atmosphere we have today in this country, Mr. Chairman, the phrase "One nation under God" is no longer credible in public. People sort of get uneasy.

This has become, increasingly, a hedonistic society that wants to throw off all constraints. In our schools we teach sex education, including homosexuality as an alternative life style, and we encourage children to try it. (See Figure 8.)

Planned Parenthood encourages it in their curriculum. The National Education Association encourages it. And they control the schooling of the children.

In the values education portion of the curriculum we talk about stealing as being maybe good, maybe bad—you decide.

The **Chairman**. In the interest of time, since my time is going to run out, can you tell me, though——

Rabbi **Handler**. Quickly, I will get to the point.

The **Chairman** [continuing]. Why do you think Judge Bork disagrees with the Supreme Court?

Rabbi **Handler**. Okay. Because he says the Supreme Court got away from original intent because it was constrained, it could not meet the new needs of this force in society by going with original intent which was religiously based.

When Judge Bork says that he agrees with the framers, he is saying that he wants to look at the Constitution and understand it the way they did, and that is precisely why people who are very secular oppose him, because they feel that.

The **Chairman**. Well, before this committee he said he has taken no position on prayer in school. He has implied that he might be able to support the abortion decision before the Supreme Court. He said those things, as did witnesses speaking on his behalf. That is why I am confused.

He said before us, that he has taken no position on prayer in school. As a matter of fact he vigorously denied having been one who would support prayer in school.

He has further implied that there may be a way in which you could reach the conclusion the Court has, allowing women to have abortions.

And two of his most prominent supporters both testified that they thought—although they said they could not speak for him—they thought he would be supportive of a decision based under the Constitution to allow women to have abortions.

So, obviously, you would not be here if you thought he supported abortion, and you would not be here, I suspect, if you thought he opposed prayer in school.

So I am curious what you know about him that he has not told us, or his supporters have not told us.

Rabbi **Handler**. I have submitted in the record a memorandum from Yale Law School by Judge Bork, in which he says, "Contrary to assertions made, homosexuality is obviously not an unchangeable condition like race or gender. Individual choice plays a role in homosexuality." (See Figure 9.)

He obviously has the old traditional viewpoints. He is not that kind of liberal whose mind is so open that his brain falls out. He has common sense. He has common sense. I think the hallmark of this man is that he will not allow you to program him.

That is precisely what he said about abortion. We have in the Talmud such rules that if the people have already accepted something, there are now difficulties in going back to status quo ante.

You cannot just make a U-turn and drop everything. You have got a society, you have got people, you have got things done.

I think that is precisely his strength. Everybody can talk to the man and they know he is intelligent enough to understand what you are saying in the first place, and then he is the type of person who can take these viewpoints and try to give everybody something that he can go home with, so that you do not feel shut out of the system, as we have felt increasingly as decent religious citizens.

We are shut out of the system under the Supreme Court decisions. The public square has become hostile to decent people who want to raise children in this society.

A black woman who reads the Bible and tells her son, "You mind your teacher now," and her son will come home and say, "My teacher said I should be a homosexual and it's just as good as being married. In fact I don't even have to get married. He said it in a sex education course. And in values education he told me stealing is not necessarily bad."

So now she says, "Don't mind the teacher." Now what is she to do? She is stuck. And she reads her Bible, and everybody is undermining her all the time.

How do you expect to get a decent citizenry that way? This is criminal.

The CHAIRMAN. I appreciate your testimony. My time is up. I yield to my colleague from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

Rabbi Handler, we are glad to have you here.

Rabbi HANDLER. Thank you, Senator.

Senator THURMOND. How many Jewish people would you say your organization represents?

Rabbi HANDLER. Well, we represent rabbis, Senator Thurmond, over 600 rabbis, but our organization speaks to over half a million orthodox Jews.

Our past president, Rabbi Moses Feinstein, was the number one authority in Jewish law in the entire world.

Senator THURMOND. Over half a million——

Rabbi HANDLER. His decisions were binding all over the world.

Senator THURMOND. Over half a million?

Rabbi HANDLER. Yes.

Senator THURMOND. I am glad to see you are in favor of confirming Judge Bork. I guess you have studied, more or less, his life and the issues at stake here, and other things which have caused you to reach that conclusion.

I just want to ask you one question, without taking a lot of time. Do you feel that Judge Bork possesses the qualifications of the kind of man we should have on the Supreme Court, such as integrity, and judicial temperament, professional competence, courage, kindness, dedication?

Rabbi HANDLER. Senator Thurmond, I am not a lawyer and you would need a lawyer to answer that question.

I support him because he seems a man of consummate common sense and reasonableness. I have seen his decisions are precise. He is not a demagogue who makes a very abstract statement and tries to force everybody into—that square hole into the round hole—square peg into a round hole.

He looks at each case and decides it on its merits, uniquely. That is a sign of a sharp mind. It is something we do as Rabbis, because you know, when someone comes to us for a chicken and asks is it kosher or not, we take a look who is bringing the chicken.

If it is a poor man, and he just spent his last dollar on the chicken, we will spend an hour figuring out if we can find something that is going to make that chicken kosher.

But if he is a wealthy man and the chicken does not look so good, we say, sir, to honor the Lord, throw away the chicken, show that you are a sport and that you care for God, and that is your sacrifice. Buy yourself another chicken.

The **Chairman**. You sound like a Democrat. [Laughter.]

Senator **Thurmond**. Well, we have not asked you whether you are a Democrat or a Republican.

The **Chairman**. And I am not asking now.

Rabbi **Handler**. Sir, I am a Jew.

Senator **Thurmond**. Or an independent.

Rabbi **Handler**. I am a Jew. I am a God-fearing Jew.

Senator **Thurmond**. And regardless of what party you are inclined to, you do support Judge Bork?

Rabbi **Handler**. We support Judge Bork on the basis——

Senator **Thurmond**. And you do it because I understand you say his common sense, and because you do not think that he is a demagogue, and because you think he believes in God and is a good man, and therefore you support him.

Is that the essence of it?

Rabbi **Handler**. We feel he speaks for the mainstream of Americans. He speaks as a real person who every average American can relate to and understand. He understands the people. He is not an elitist.

Senator **Thurmond**. Thank you very much.

The **Chairman**. Senator Leahy.

Senator **Leahy**. Thank you, Mr. Chairman.

Rabbi Handler, some of the congregations which your members serve have Jewish parochial schools, do they not?

Rabbi **Handler**. Absolutely, sir. We believe in that very strongly. It is the survival of our people.

Senator **Leahy**. All three of my children attended parochial schools, Catholic parochial schools, and I was very pleased with that, and because of that I am particularly interested in a couple of Supreme Court cases.

One was *Pierce* v. *Society of Sisters*. It held that States could not require all children to attend public schools. In other words, the State could not say you cannot attend parochial school, you have all got to attend public school, something that any of us interested in parochial schools would favor, at least that opinion.

The second was *Meyer* v. *Nebraska,* and it held that States could not forbid the teaching of foreign languages in a school. In other words, the State could not tell a parochial school, or any others, you cannot teach a foreign language, you cannot teach Hebrew, you cannot teach French, Italian—whatever.

Now Judge Bork criticized both of those decisions as being wrongly decided. Now both those precedents would seem really essential to protect the Jewish parochial school, to protect the Roman Catholic parochial schools that my children attended.

Does that trouble you, that Judge Bork questioned the constitutional basis of those decisions?

Rabbi HANDLER. No, it does not, sir, because I do not believe that that is the case, exactly as you have stated it, because the Agudath Israel of America has a Committee on Law and Public Procedure which is composed of lawyers, and in taking their position on Judge Bork, they are acutely aware of these things, and they have stated that Judge Bork is not hostile to religion and to religious schools.

Senator LEAHY. Rabbi, just to make sure you understand my question. I am not suggesting he is hostile to religion or religious schools. I do not know what his views are on religion and it is immaterial to me what his views are on religion.

What is very material to me are his views on the law. We have had a lot of areas where he has discussed his opposition to a particular Supreme Court case, where none of us—supporters or opponents—would ever ask him what his personal views are in the area. I do not care what his personal views are on abortion.

I do not care what his personal views are on contraception. I do not care what his personal views are on prayer in school, or parochial schools.

But I do care about his views on the law. These are two cases that are very supportive, in fact essential to the maintenance of parochial schools in this country. Both of them he has criticized on the law.

Does that trouble you?

Rabbi HANDLER. Well, the only thing I could do is tell you a little anecdote about our past president, Rabbi Moses Feinstein, who was the world's most prolific writer of legal opinions, I guess similar to Judge Bork. (See Figure 10.)

And the most widely misunderstood person, because he wrote so much, and very few people knew what and understood what he meant. You had to be a very sharp legal scholar to understand nuance and application.

You only get one in a generation like Rabbi Feinstein. You know, when somebody tells me that somebody did such and such, I tend to take it with a grain of salt until I see the details of the decision.

You are telling me something which does not make too much sense to me, and based on my understanding that Judge Bork is a sensible person, and agrees with the original intent of the framers, which was to establish religiously based schools, because there was no public-school system until Horace Mann established them in the late 1800's. That sounds very—it does not ring true.

Senator LEAHY. Even though he has criticized them as being wrongly decided?

Rabbi HANDLER. I do not know what his criticism was, but it does not ring true according to my understanding of the framers——

Senator **Leahy**. And one other thing. You have talked about your discussions with a member of Senator Thurmond's staff and a member of Senator Biden's staff when you first started off here this morning.

Rabbi **Handler**. It was not a discussion. It was simply a telephone conversation that I received.

Senator **Leahy**. I understand. A telephone conversation with, first, a member of Senator Thurmond's staff, and then one of Senator Biden's.

We all welcome you here, you understand that, but you said one thing which I assume was perhaps a tad overstated. You stated, you said this is the "worst thing" you have seen in your life, or words to that effect.

Rabbi **Handler**. Well, that was, I think, hyperbole.

Senator **Leahy**. I thought perhaps before you went back to your congregation, you might want a chance to note that that is not the worst thing you have seen in your life.

Rabbi **Handler**. I think it was an attempt to manipulate this process, I think it was an unfair attempt, and I think it is the kind of thing that is shameful, and does not belong in the Congress, and I still think she should be fired.

Senator **Leahy**. Rabbi, you are here, you are here testifying, and we have had, I think—and I would say this as a compliment to the Chairman, and a compliment to the ranking member—to both Senator Biden and to Senator Thurmond. We have had a very, very strong representation of people speaking for Judge Bork and people speaking against Judge Bork, and I think that they have all been given ample opportunity, as well as a number of others who have been able to submit material for the record, both through supporters and opponents of Judge Bork.

I think the general consensus around here is that these are about the fairest hearings, certainly that I have seen in 13 years here.

Rabbi **Handler**. Well, I will leave that stand as is.

The **Chairman**. We will look into it, Rabbi——

Rabbi **Handler**. Thank you very much.

The **Chairman** [continuing]. And I will get back to you. But now, let me yield to my colleague from Wyoming.

Senator **Simpson**. Thank you, Mr. Chairman. It is good to have you here, sir and——

Rabbi **Handler**. Glad to be here. Thank you.

Senator **Simpson**. I will add, I have a little phlegm in my throat there.

And I think that is cleared now, sufficiently.

There have been so many groups, on both sides, that have wanted to testify here, that it would be chaotic to try to sort through it. It really has been extremely heavy, and I know that the Chairman would not, and I know Diana Huffman would not intentionally do anything that would be unattractive, or biased, or totally politically. The searchlight is on them, and I think they have handled that very well, and they have met our requests for various witnesses, and knowing Diana as I do, I would hope that she would—and knowing her, she will probably contact you personally and give you the information as to what did happen there.

Well, yours is a powerful statement, and it is so helpful to have that because yesterday, we actually had—I think it was yesterday—a person really testifying that Judge Bork was anti-Semitic.

I mean, let's get right down to the nub of it. That is the appalling thing about the hearings. They are not just going for shaded words in this hearing. There is no subtlety in this. He is a racist.

He is a poll taxer. He is a sterilizer. He is a fink. And there is no munching around, no mincing of words, and that is, I think, a disturbing thing when, in every other breath that they utter at that table, it is about what a remarkable intellect and a remarkable man he is. You cannot have it both ways. He cannot be all that.

And he cannot be so polarized and so frightening a figure, an ogre of the first proportion.

Rabbi HANDLER. Have they accused him of being a member of the Nazi Party yet?

Senator SIMPSON. I am sorry?

Rabbi HANDLER. Has anyone accused him of being a member of the Nazi Party yet?

Senator SIMPSON. I do not think that creativity has come up. But, you know, I do not mean to be a smart-aleck, but it is almost all that. I mean, literally, it is close to that with some people who are speaking about him, and I think that is very unfortunate, and I think it will backfire.

And my sense is that it will, and it will on the floor of the U.S. Senate, because 86 other players will be in this game, and they are going to say: Is it true what we heard about Bork?

And somebody is going to get up and say it is the most grotesque distortion you can ever imagine, and we will tell you why. And then we will go sorting through the cases.

But anyway, we, as I said, received testimony from a minister who said that Judge Bork was insensitive to the concerns of a young Jewish student who found himself in an uncomfortable religious conflict with the traditional Christian practices of his classmates.

Judge Bork just totally denied any insensitivity of the nature reported.

Do you know of anything, in what you know of Judge Bork, or your group of Rabbis in the United States—any notion whatsoever of anti-Semitism, or religious intolerance, or insensitivity on behalf of this nominee?

Rabbi HANDLER. No, we do not, Senator, and I think it is ridiculous to even discuss such things. No serious person would entertain such a notion.

Senator SIMPSON. Well, there are serious persons that bring it up. They asked to bring this man in here to testify to that effect, and were hoping that it would have some impact on one thing only—that he was anti-Semitic.

Rabbi HANDLER. Well——

The CHAIRMAN. Well, if the Senator will allow me to interrupt. I believe the only reason he was asked——

Rabbi HANDLER. Excuse me just one second. Just let me speak——

The CHAIRMAN. I understand that, but I am the Chairman of the committee.

Rabbi HANDLER. I am just saying that—I just want to make one point.

The CHAIRMAN. If you will just let me finish, you can make all the points you want. I just want to clarify one thing. You will have plenty of time.

The reason why the witness was asked by a member to be brought in was that there had been an account in the press relating to whether or not Judge Bork was for, or against prayer in school, and whether Judge Bork was in fact, did or did not respond to a discussion of prayer in school in a way that was recounted in the press, and contradicted by a participant there.

That was the reason. Not to in any way accuse Judge Bork of being anti-Semitic, nor did the witness accuse him of being anti-Semitic. But having said that, add two more minutes to that time because I have taken some time.

Rabbi HANDLER. Thank you, Mr. Chairman.

I think when you get into these very emotional discussions, and of course religion and politics traditionally have been areas that a good businessman never discusses because it is so emotional.

By definition it is an emotional discussion. And when we talk about emotions we talk about love, and we know that love is blind. And hate is blind, too. And when someone hates, he says some things that, upon further reflection, he may well find he is ashamed of, and I think that is probably the case in that instance.

Senator SIMPSON. Well, I just know that with the fine fertile ground of distortion that I have seen in my 2 weeks here, that the Chairman's explanation of that may be true, but then it went further than that, and something was said, don't you realize that that young man was very hurt, or sensitive, and Bork was alleged to have said, "He'll get over it." A very flip statement, a very insensitive statement was intended to be portrayed.

It had all the smatterings of what I have suggested, and——

Rabbi HANDLER. Heaven help us if some one would examine my statements. I just got caught up by the Senator before, Senator Leahy. He corrected me. I would not want to be examined——

Senator SIMPSON. He will again in just a minute.

Rabbi HANDLER. I would not want to be examined and scrutinized by God on Yom Kippur for the statements I have made all year.

Senator SIMPSON. Well, maybe that is where we miss our calling here. I think we think we are judges. I am guilty of that. And the fourteen of us are somehow judges. And I guess that is what we are, but there is one final judge in our lives, and that is a great part of your belief, and mine.

Well, just another thing to kind of put it in perspective. That it was Judge Bork who protected a young Jewish member of the bar in Chicago, a fledgling associate of that firm. That was the clear testimony of Mr. Howard Krane, I believe was his name, and the whole indication we have is sensitivity to other religions. Even though he himself is not Jewish, his first wife was Jewish.

His three children are of the remarkable blend of that faith, and that is the way that is. So maybe we will not have any more discussion about that. That would be, it seems, very logical and very honest. Thank you so much.

Rabbi **Handler**. Thank you, Senator.

The **Chairman**. Thank you. The Senator from Alabama.

Senator **Heflin**. I do not believe I will ask any questions.

The **Chairman**. The Senator from Iowa.

Senator **Grassley**. Mr. Chairman, will you pass over me, and then come back to me?

The **Chairman**. The Senator from Pennsylvania.

Senator **Specter**. Thank you very much, Mr. Chairman.

Rabbi Handler, you have testified that you would like to see more of religion in our society.

Could you amplify, just a bit, what you would like to see occur under your approach.

Rabbi **Handler**. Yes, of course. I think that I would like to see what George Washington recommended, and I will use his terminology because he said it so well. "Reason and experience—in his Farewell Address.

"Reason and experience both forbid us to expect that national morality can prevail in the exclusion of religious principle."

There has to be some absolute standard that a parent can point to in teaching a child. The family is the key to this country, and bringing up children is the key to the future of the country.

And you cannot bring up a child in a relativist atmosphere. There has to be some standard, and the only standard that works, that we know of, that the Founders intended, is the standard of Biblically-based religious standards.

Now it does not have to be a specific religion, because according to Professor Berger in his address, the Founders established a multi-denominational pluralistic religion in this country. There is an established religion of that kind.

They intended all the religious faiths to fill in what the Constitution left out, which is religious standards, and they wanted to actively help all of these denominations, equally, across the board. Help pay for their schools, because this was in the national interest.

And the civil religion that came about from this coming together of all these different religious strands, certain basic ideas were affirmed, that you will get married, you will have a family, you will have children. You will bring up these children as upright and good citizens. You will teach them self-control.

You will teach them to honor other people, and to tolerate people of other religions. And in that sense it is important that we talk about God.

We have to say, in the Pledge of Allegiance: "one nation under God." We should say that constantly. We should not forget that there is a Boss in this world, and we have a final accounting, and this is what restrains us, for without that, we do whatever we please, and what we please is normally taking advantage of other people and putting them down.

Senator **Specter**. Well, Rabbi, when you articulate the goals of tolerance and morality, there is obviously no disagreement. The first amendment has two ideals when it comes to religion. One is free exercise, and you have commented about that, that the framers wanted everybody to be able to choose their own.

The other concept is a concept against establishment. Do you think that it is appropriate for the Government to play a role in the establishment of various religions?

Rabbi HANDLER. I will repeat what I said. The Government has to affirm that God rules the world. It is the only way. The alternative is, no one rules the world, you do what you please, and that is the beginning of a police state. That is what Weimar, Germany was before Hitler. They had—I notice there is a revival of "Cabaret" now, in a more risque version, where there is androgenous people, homosexuals. Nietzsche. Max Weber's philosophy. Heidegger. Valueless nihilism. This was Germany before Hitler, and many people do not realize that Hitler won the election with the votes of decent family people by promising them that he would bring order out of this moral chaos that was just turning Germany into a slime, where nobody knew what was right or wrong any more.

Barbara Tuchman just commented in the New York Times 2 weeks ago, in her article about the fall of America—something to that effect—that nobody knows what right and wrong is any more.

Allan Bloom in his new book talked about that. He is a professor in the Ivy League for 30 years. They are going to pot.

Senator SPECTER. Well these are very weighty subjects, and I do not know to what extent my question really bears on the nomination of Judge Bork, but the considerations which we have before us here really turn more on allowing religion to have a free exercise to encourage people to believe in God, and to believe in morality as opposed to having the Government play an active role.

And the constitutional doctrine which has been established is very forcefully against, under the establishment clause, against having the Government play any role in the establishment of any religion.

Rabbi HANDLER. That is not what Peter Berger says. Peter Berger says it is not freedom from religion; it is freedom for religion.

A multidenominational, pluralistic establishment is what the framers put down. They could not envision a society of virtuous, self-regulating people without the belief in the Bible—they couldn't have a free society, they would have had to establish Soviet Russia, a police state, to keep people from tearing each other's throats out.

Senator SPECTER. Well, Rabbi, I did not expect to get too far on this conversation in 5 minutes, and I have not been surprised. Thank you.

The CHAIRMAN. The Senator from Ohio.

Senator GRASSLEY. Rabbi, first of all I didn't hear your statement, but it's a pleasure to have you here, and I particularly appreciate the forceful statement you just made to Senator Specter in response to Senator Specter's questions and dialogue.

Are you, as a member of a minority religious group, concerned—or maybe some people would even use the word "fearful"—about Judge Bork's views on separation of church and state and the free exercise of religion?

Rabbi HANDLER. I'll tell you a story about the Baal Shem-Tov, who was the founder of the Hassidic movement. He was once traveling in a wagon with a Christian driver, and they passed a crucifix on the corner, and the driver did not cross himself, as was the custom in those days. And the Baal Shem-Tov said: get me off of this wagon, who knows what that man is going to do to me?

Senator GRASSLEY. Are you frightened by any of Judge Bork's views as he stated them, as opposed to what people have said his views might be on civil rights?

Rabbi HANDLER. On civil rights, I believe the civil rights battle has been won by black people in this country; they are treated as equal citizens, they are considered equal citizens, and I don't think there is any argument in that area any more.

The only civil right that they don't have and that is being denied to them—and it's perhaps more important than all the rights put together—is the right to have an intact family structure, which is the key to their success. The terrible tragedy of the broken black family, which Senator Moynihan has documented in his report "Beyond the Melting Pot," is what's killing the black community in this country. I have spoken before about the black woman who reads the Bible.

I had opportunity many years ago to found a coalition of anti-crime groups, the New York Anti-Crime Coalition, and in pursuit of people to join me I went to the Baptist Ministers Conference in Bedford-Stuyvesant, and although there was one black minister who got up and said "We don't want no Rabbi talking to us here," he was put in his place by the overwhelming majority of decent ministers, and they told him, well, we do want a rabbi to talk to us about crime. And, believe me, some of the things that they proposed were Draconian compared to anything you've heard about; they wanted to just machine-gun the drug peddlers on the corner without any due process.

I also had occasion to speak to the African Methodist Episcopal Ministers Conference in Harlem. Their problem is, in the black community, that the family is broken, the welfare system encourages kicking out the husband because there's more money if the husband is gone; the woman is all alone to take care of the children; she sends them to school, and the school teaches them that the Bible is old-fashioned and whatever your mother taught you, forget about. And they fall prey to the drug dealers on the corner. They don't have anything to fall back on.

Society is not affirming the values that the decent black people want to give their children. And that's a tragedy. And black progress is held back by the fact that they can't form a stable—I'm not saying all—many of them, a very large proportion cannot form a stable family on which to bootstrap themselves into prosperity and to bring themselves up in the world, because they constantly have to start from point zero with broken homes. (See Figure 11.)

Senator GRASSLEY. I think maybe from the standpoint of your position, though, as a member of a religious minority, and as civil rights of religious people in the world sometimes are violated, is there anything in Judge Bork's views that you feel frightened by?

Rabbi HANDLER. I think in understanding Judge Bork, you have to understand that he's a little bit like me: he's flamboyant in the way he speaks. And that's really the secret of his success with his students. He speaks very sharply and he likes to draw sharp contrasts to make a point, a debater's point. And sometimes when we are engaged in debate, we play devil's advocate.

I think it's unfair to take a man and take some positions that he's done to make points and say that this is the man. My reading of him, where I've had occasion to look into his words, have been very subtle. This Yale memorandum, which I suppose he dashed off very quickly, because it's a memorandum, on homosexual business in Yale University and his opposition to that, to legitimizing it through faculty activity, shows a great subtlety. In fact, in one paragraph he summarizes what our own Agudath Israel takes about 10 pages to say (See Figure 12); he gets to the heart of it in one paragraph while dashing it off. That shows a very subtle, sharp, incisive, careful mind. And I don't regard such a person as threatening in any way. I am very comforted by that.

Senator **Grassley**. Mr. Chairman, my time is up.

The **Chairman**. Senator from New Hampshire.

Senator **Humphrey**. Thank you, Mr. Chairman, and Rabbi Handler. We are very glad that you are able to come. It's refreshing to hear someone who speaks so plainly. We've heard a lot of very sophisticated law professors and others, but it is truly a relief to hear someone speak plainly. And I think you've addressed a lot of the heartfelt concerns of all Americans, not only of your own community but of all Americans who yearn, as you say, to raise decent children. I certainly agree with you in your assessment that, as you put it, the public square has become hostile to decent citizens, whether it's the television fare which hourly, day after day, portrays depravity as normal and commonplace, or whether it's the courts—the judges, I should say—who find yet new rights for criminals such that adequate law enforcement is often lacking in our communities. You are right, I believe, that the public square has become hostile to decent citizens trying to raise decent children.

Some of the witnesses who have appeared before us in opposition to Judge Bork are people who believe that judges ought to read the Constitution expansively. For example, some of these witnesses suggest that there are no constitutional grounds for laws which make unlawful prostitution, that prostitution laws, duly passed by the elected legislatures, ought to be struck down because they invade privacy, for example; and likewise laws that legislators have duly passed which make unlawful the use of illicit drugs ought to be struck down, because that is another area that is protected by the privacy which they claim is required, expansive privacy which they claim is required by the Constitution.

So you are very much on target when you assess this, as I believe you have, when you assess the battle over this nomination as at least in part a battle for bringing decency back into the public marketplace, because the kinds of decisions that judges render, the kind of approach they take to their responsibility as judges, determines whether or not the elected representatives of the people have a great deal to say about the climate in the public square. If we have another judge—it certainly wouldn't be Robert Bork—but if ultimately this vacancy were to be filled by yet another judge who believes in this expansive power of judges to insert their own values into their judging decisions, into their decisions—if we have more judges who believe that they are entitled and required to insert their own values into their judicial opinions, then the efforts of legislators to maintain some semblance of decency in this country will be further defeated.

So I think you are quite right in the way you approach this.

By the way, you might be interested in knowing, Senator Leahy raised the subject of decisions on which Judge Bork has commented—they were decisions made before he reached the bench, but nonetheless he has commented on them. And one of them was *Meyer* v. *Nebraska*, which involved the striking down of a State statute forbidding the teaching of subjects in any language other than English. Now, Judge Bork was critical of that decision, but not of the result; it's not as though he favored the law. What he objected to—and this is an important distinction in this case and in so many of the cases which have been used to criticize Judge Bork—not that he didn't favor the result, the outcome of that decision; he disfavored the process by which the courts came to that decision, seeing in that process an interjection of the values of the judges as opposed to the true meaning and intent of the Constitution.

Rabbi HANDLER. I'd like to comment on that. You see, there's a problem that a judge has, and we, Talmudic scholars, are really lawyers in our own community—we have a problem. If you are going to get the result you want, you want to get the result very badly, you want to make that chicken kosher, but in the process you are going to toss out the whole Bible, have you really made a good trade-off? Sometimes you tell the man, look, buy yourself another chicken—but we can't throw the Bible out of the window. We just have to stand on principle.

I think what Judge Bork is saying is that you have to honor the framers, because that's the mooring, the anchor that this country stands on.

Senator HUMPHREY. Yes.

Rabbi HANDLER. If you want to get a good result and just toss the whole thing out the window, what's to stop the next guy, who may be a closet Nazi, from putting in his values? You have no reference point any more, you are lost.

Senator HUMPHREY. Exactly right, no reference point. And no one suspects that any Nazis will ever get through the Senate and be confirmed to the Supreme Court or to any part of the federal judiciary, but the fact remains, the historical fact remains, that the Court has made some awful decisions, oppressive decisions, affecting civil rights and human rights, when judges resort to inserting their own values in place of a careful and faithful reading of the Constitution. That is all Judge Bork pledges, a careful and faithful reading of the Constitution. He pledges he will not interject his own values. I find that reassuring.

But many of those who oppose him do not; they prefer judges who are subjective and who interject their own values into their decisions. That's dangerous, as *Dred Scott* showed us, as *Lochner* showed us, and many decisions which have gone against the tradition of civil rights in this country. So it works both ways.

Rabbi HANDLER. Well, if the Constitution needs updating, there's a process for that; it's the amendment process—it works.

Senator HUMPHREY. Exactly. Thank you, sir.

The **Chairman**. Thank you. Rabbi, thank you very much; it's a pleasure having you with us.

Rabbi **Handler**. Thank you, Mr. Chairman.

[Aforementioned material follows:]

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THE LARGEST INDEPENDENT ANGLO-JEWISH WEEKLY NEWSPAPER
Copyright ©1987 The Jewish Press Inc. *"Teach Me Thy Way, O L-rd. That I May Walk In Thy Truth"* Psalms 86:11

VOL. XXXVII No. 39 WEEK OF SEPTEMBER 25 TO OCTOBER 1, 1987 2 TISHREI 5

Agudath Israel Tells U.S. Senate To Confirm Judge Bork

Against the background of the ongoing Senate hearings on President Reagan's nomination of Judge Robert Bork to the U.S. Supreme Court, Agudath Israel of America became the first maker national Jewish organization publicly to support the nomination

In an elaborate memorandum to the members of the Senate Judiciary Committee, David Zwiebel, Agudath Israel's director of government affairs and general counsel, conveyed the rationale underlying the 65-year-old Orthodox Jewish movement's historic decision to speak out on the Bork nomination:

"Agudath Israel has never before taken a public position on any nomination to the Supreme Court, and several members of its board urged that the organization maintain its policy of neutrality on Supreme Court nominations. However, because the Bork nomination has generated such broad public comment, and especially because so many Jewish groups have spoken out against the nomination and may thereby have created the misconception that 'the Jewish community' is united in its opposition to the principles for which Judge Bork stands, the majority of Agudath Israel's board concluded that neutrality would not be an appropriate response on this occasion."

The Agudath Israel memorandum focuses on two broad themes: the organization's view that "Judge Bork's presence on the Supreme Court could have a positive influence in some of the great public policy issues of our day"; and Agudath Israel's belief that "the overall philosophy of judicial restraint so eloquently espoused by Robert Bork...is ultimately in the best interests of all Americans, including minority communities like ours."

FIGURE-1

The JEWISH PRESS
THE LARGEST INDEPENDENT ANGLO-JEWISH WEEKLY NEWSPAPER
Copyright ©1987 The Jewish Press Inc. *"Teach Me Thy Way, O L-rd. That I May Walk In Thy Truth"* Psalms 86:11

VOL. XXXVII No. 37 WEEK OF SEPTEMBER 11 TO SEPTEMBER 17, 1987 17 ELUL

EDITORIALS

The Confirmation Of Judge Bork

The vote, within a few weeks, in the United States Senate over whether or not to confirm President Reagan's nomination of Judge Robert Bork as Justice of the Supreme Court is quite seriously a matter of life and death for ourselves, our children, and our grandchildren. Most of the unchecked violent crime, including street muggings, rapes, burglaries, etc., — and the breakdown of our criminal justice system — are largely due to soft-on-crime radical, liberal judges on the Supreme Court and lower courts.

Judge Bork a moderate conservative, is a wise and sensible law and order judge. While on the federal Court of Appeals in Washington, Bork issued a ruling in favor of the death penalty, and another ruling rejecting accused Nazi war criminal Ivan Demjanjuk's efforts to avoid deportation to Israel. Supporting Bork is the vast, overwhelming majority of the nation's police and law enforcement officials.

In addition, and of gravest importance, many crucial lawsuits involving efforts to expand nationwide the "gay rights" agenda of militant homosexuals, as well as wise and responsible efforts to prevent promiscuous homosexuals from further rapidly spreading AIDS and contaminating the nation's blood supply, are expected to come before the Supreme Court. Judge Bork has shown himself to be flatly opposed to an activist liberal judiciary imposing the homosexual lifestyle ("gay rights") agenda on the American people, including our young school children.

As might be expected, the well-financed radical homosexual and lesbian organizations strenously oppose Bork, as do the leading lobbyists for criminal "rights," such as the ACLU.

All this is clear enough proof that Bork is our man — not to mention that a growing number of influential leading rabbis back Bork. A man is known by both his friends and his enemies.

The Supreme Court presently is divided between four liberals and four centrist to conservative justices, so Bork would help tip the balance our way. Since Supreme Court decisions set the social and moral climate for generations to come, we see how important the Senate vote on Bork is. We call on Senators Moynihan, D'Amato, Weicker, Dodd, Lautenberg, Bradley and our other Senators to vigorously back Bork.

FIGURE-2

> Of all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports. . . . In vain would that man claim the tribute of Patriotism, who should labour to subvert these great pillars of human happiness, these firmest props of the duties of Men and Citizens. The mere Politician, equally with the pious man ought to respect and to cherish them . . . And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on the minds of peculiar structure; reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.[26]

[26] "Washington's Farewell Address," C. R. Gaston, ed., in *Standard English Classics.*

. . . .

A more legalistic approach to the historic analysis of sectarianism, and Bible reading's place in the public schools, is made by the Michigan court and is representative of the approach used by some midwestern courts.[23] The Michigan court explained that the state constitution of 1835 incorporated the Federal Ordinance of 1787. The Ordinance said in part,

> Religion, morality and knowledge are essential to good Government and the happiness of mankind, and for these purposes, schools and the means to education shall ever be encouraged.

The court also pointed out that while the Ordinance did not make the teaching of religion imperative, it precludes the idea that the founders of the state's constitution meant to exclude the Bible from the public schools.[24]

[23] People ex rel. Ring v. Board of Education, 92 N.E. at 253; Board of Education v. Minor, 23 Ohio St. at 239 and 245.

[24] 77 N.W. at 252.

FIGURE-3

Library of Congress Cataloging in Publication Data
Berger, Raoul, 1901–
Government by judiciary: The transformation of
the Fourteenth Amendment

Page-1

THE Fourteenth Amendment is the case study par excellence of what Justice Harlan described as the Supreme Court's "exercise of the amending power,"[1] its continuing revision of the Constitution under the guise of interpretation. Because the Amendment is probably the largest source of the Court's business[2] and furnishes the chief fulcrum for its control of controversial policies, the question whether such control is authorized by the Constitution is of great practical importance.

. . . .

A corollary is that the "original intention" of the Framers, here very plainly evidenced, is binding on the Court for the reason early stated by Madison: if "the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable [government], more than for a faithful exercise of its powers."[7]

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[1] Reynolds v. Sims, 377 U.S. 533, 591 (1964).

[2] Felix Frankfurter, "John Marshall and the Judicial Function," 69 Harv. L. Rev. 217, 229 (1955).

[7] 9 James Madison, *The Writings of James Madison* 191 (G. Hunt ed. 1900–1910).

FIGURE-4

Library of Congress Cataloging in Publication Data

Goldberg, George, 1935-
Reconsecrating America

Page 118

But the issue must be discussed against the background of the First Amendment, not, as is too often the case, in a vacuum. The idea that secular or "humanistic" ideals are entitled to the same constitutional consideration as religious principles, or that agnosticism and even atheism must be given equal constitutional billing with traditional religion, is simply false. All forms of expression enjoy constitutional protection under the free speech and press clauses of the First Amendment, but religion enjoys something more: the free exercise thereof. The argument that to give nondiscriminatory aid to all religions is to discriminate against irreligion has as its effect, if not its purpose, the emptying of the free exercise clause of any meaning whatsoever.

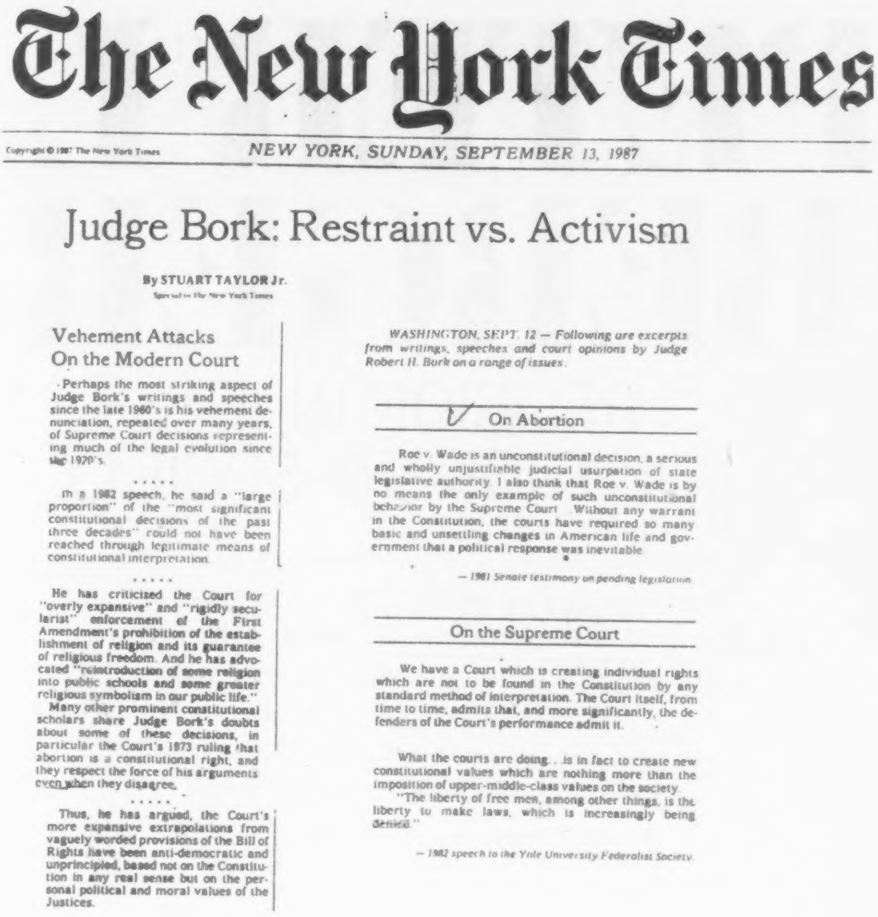
But the basic weakness of the strict separationist position on school prayers is that it is not honest. It is fascinating how the same people who on certain occasions profess great sympathy for minorities and poor people turn into Marie Antoinette when confronted with school prayers: let them go to private school, or let their parents teach them religion. How can a person who in the context of aid to dependent children cites statistics of broken homes, rodent-infested apartments crowded beyond imagination, and children roaming the streets untended, in the context of school prayers conjure up warm families sitting around the fireside listening to the paterfamilias (50 percent of minority children in the United States live in fatherless homes) recite verses from the Bible with appropriate commentary?

. . . .

Sex must be taught in the schools because parents are unequal to the task, but religious instruction is held to be within their competence. Surely the evidence compels the opposite conclusion.

The argument that, like Sergeant Friday in the old *Dragnet* series, schools are only concerned with *facts*, is equally untenable. The selection and presentation of the limitless supply of available observations, theories, and opinions determine the direction and meaning of the educational process.

FIGURE-5



The New York Times

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NEW YORK, SUNDAY, SEPTEMBER 13, 1987

Judge Bork: Restraint vs. Activism

By STUART TAYLOR Jr.

Special to The New York Times

Vehement Attacks On the Modern Court

Perhaps the most striking aspect of Judge Bork's writings and speeches since the late 1960's is his vehement denunciation, repeated over many years, of Supreme Court decisions representing much of the legal evolution since the 1970's.

* * * * *

In a 1982 speech, he said a "large proportion" of the "most significant constitutional decisions of the past three decades" could not have been reached through legitimate means of constitutional interpretation.

* * * * *

He has criticized the Court for "overly expansive" and "rigidly secularist" enforcement of the First Amendment's prohibition of the establishment of religion and its guarantee of religious freedom. And he has advocated "reintroduction of some religion into public schools and some greater religious symbolism in our public life."

Many other prominent constitutional scholars share Judge Bork's doubts about some of these decisions, in particular the Court's 1973 ruling that abortion is a constitutional right, and they respect the force of his arguments even when they disagree.

* * * * *

Thus, he has argued, the Court's more expansive extrapolations from vaguely worded provisions of the Bill of Rights have been anti-democratic and unprincipled, based not on the Constitution in any real sense but on the personal political and moral values of the Justices.

WASHINGTON, SEPT. 12 — Following are excerpts from writings, speeches and court opinions by Judge Robert H. Bork on a range of issues.

On Abortion

Roe v. Wade is an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority. I also think that Roe v. Wade is by no means the only example of such unconstitutional behavior by the Supreme Court. Without any warrant in the Constitution, the courts have required so many basic and unsettling changes in American life and government that a political response was inevitable.

— 1981 Senate testimony on pending legislation.

On the Supreme Court

We have a Court which is creating individual rights which are not to be found in the Constitution by any standard method of interpretation. The Court itself, from time to time, admits that, and more significantly, the defenders of the Court's performance admit it.

What the courts are doing. . .is in fact to create new constitutional values which are nothing more than the imposition of upper-middle-class values on the society.

"The liberty of free men, among other things, is the liberty to make laws, which is increasingly being denied."

— 1982 speech to the Yale University Federalist Society.

FIGURE-6

3648

PETER L. BERGER

RELIGION IN A REVOLUTIONARY SOCIETY

Figure - 7

THE BICENTENNIAL OF THE UNITED STATES OF AMERICA
200 YEARS
1776 1976

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PETER L. BERGER

RELIGION IN A REVOLUTIONARY SOCIETY

Delivered at
Christ Church, Alexandria, Virginia
on February 4, 1974

American Enterprise Institute for Public Policy Research
Washington, D. C.

The title of this address, as it was given to me, implies a formidable assignment—no less than the overall consideration of the place of religion in contemporary America. I have some reservations about applying the adjective "revolutionary" to American society. But, minimally, it refers to something very real in that society—namely, its quality of rapid and far-reaching change—and for this reason I describe our present society, not just that of 1776, as revolutionary.

This quality of change makes my assignment all the more difficult. It is a source of constant embarrassment to all commentators and forecasters. Just look what happened to the most celebrated diagnoses of our situation during the last decade: Harvey Cox published his best-selling beatification of the new urbanism just before everyone agreed that American cities had become unfit for civilized habitation. The proclamation of the death of God hit the cover of *Time* magazine just before the onset of a massive resurgence of flamboyant supernaturalism. More recently, those who were betting on the greening of America led the Democratic party to one of its biggest electoral defeats in history. And just now, when Daniel Bell has impressively proclaimed the coming of post-industrial society, the energy crisis makes one think that we will be lucky if we manage to stay around as an *industrial* society. Perhaps the only advice one can give to the sociological prophet is to write his book quickly, and then go into hiding—or, alternatively, to be very, very careful. This is not a book, but I intend to be careful. This means, among other things, that I cannot spare you some pedantic distinctions, qualifications, and less-than-inspiring formulations.

I

The consideration before me involves some sort of answer to the question "where are we at?" To try for this answer, it will help to find a date in the past with which to compare the present moment. If one wants to make rather sweeping statements, one will likely pick a date far back in history, like 1776, or the time of the Reformation, or even the late Ice Age (as Andrew Greeley did recently—his thesis being that "the basic human religious needs and the basic religious functions have not changed very notably since the late Ice Age," the credibility of which thesis clearly hinges on one's understanding of "basic"). Taking seriously my own warning to be careful, I propose to take a much more recent date: 1955. This happens to be the year in which an important book on American religion was published, Will Herberg's *Protestant—Catholic—Jew.*[1] More important, though, the mid-1950s were the years just before a number of significant ruptures in the course of American religion and of American society generally (ruptures, incidentally, which no one foresaw). It is a convenient date with which to compare the present moment. In attempting to meet my assignment, therefore, I will concentrate on two questions: *What was the situation of American religion about 1955? What has happened to it since then?*

Since this period has of late become the subject of intensive nostalgia, I should add that my choice of date is non-nostalgically motivated. I was wonderfully young at the time, and I am all too susceptible to reminiscing about my youth in a rosy glow of memories. I am quite sure that I and my contemporaries had no notion *then* of living in a particularly rosy time. It is probably inevitable that we look back on the time of our youth as some sort of Golden Age. I imagine that this was the case with individuals who were young during the Black Death or the invasions of Genghis Khan. There is a temptation to project one's own decline since then to the society at large. The temptation is to be resisted.

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[1] Will Herberg, *Protestant—Catholic—Jew: An Essay in American Religious Sociology* (Garden City, N.Y.: Doubleday & Co., Inc., 1955).

In other words, the comparison between 1955 and 1974 is not necessarily odious. But before I start comparing, I must elaborate one very essential distinction, the distinction between *denominational religion* and *civil religion.*

Denominational religion in America refers to what most people mean when they speak of religion—the bodies of Christian and Jewish tradition as these are enshrined in the major religious organizations in this country. Denominational religion is the religion of the churches. The plural, *churches,* is very important: there are many churches in America, and for a long time now they have existed side by side under conditions of legal equality. Indeed, Richard Niebuhr suggested that the very term "denomination" be defined on the basis of this pluralism. A denomination is a church that, at least for all practical purposes, has come to accept coexistence with other churches. This coexistence was brought about in America by unique historical circumstances, which were not intended by anyone and which at first were only accepted with great reluctance. Later on, a virtue was made out of the necessity, as religious tolerance became part and parcel of the national ideology as well as of the basic laws of the American republic. (Let me say in passing that I regard religious tolerance as a virtue indeed. It is all the more interesting to recognize that its original attainment was unintended. I incline to the view that most moral achievements in history have this character of serendipity. Or, if I may put it in Lutheran language, virtue comes from undeserved grace.)

Civil religion in America refers to a somewhat vaguer entity, an amalgam of beliefs and norms that are deemed to be fundamental to the American political order. In the last few years the idea of an American civil religion has been much discussed in terms proposed in an influential essay on the topic by Robert Bellah, but both the idea and the phrase antedate this essay.[2] Herberg, for instance, discussed very much the same idea using a slightly different terminology. The general assumption here is that the American polity not only bases itself on a set of commonly held values (this is true of any human society), but that these values add up to something that can plausibly be called a religion. The contents of this religion are some basic convictions about human destiny and human rights as expressed in American democratic institutions. Gunnar Myrdal, in his classic study of the Negro in America, aptly called all this "the American creed." The proposition that all men are created equal is a first article of this creed.

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[2] Robert Bellah, "The Civil Religion in America," in Donald Cutler ed., *The Religious Situation: Nineteen Sixty-Eight* (Boston: Beacon Press, 1968).

An obvious question concerns the relationship between these two religious entities. Different answers have been given to this question, and I can claim no particular competence in the historical scholarship necessary to adjudicate between them. Thus, to take an example of recent scholarly debate, I cannot say whether the civil religion of the American republic should be seen in an essential continuity with the Puritan concept of the convenant, or whether it should be understood as the result of a decisive rupture with Puritanism brought about by the Deist element among the Founding Fathers. Be this as it may, it is clear that the two religious entities have had profound relations with each other from the beginning. Nor is there any doubt that crucial ingredients of the civil religion derive directly from the Protestant mainstream of American church life, to the extent that to this day the civil religion carries an unmistakably Protestant flavor (a point always seen more clearly by non-Protestants than by Protestants, for people are always more likely to notice unfamiliar flavors). Thus, for instance, the codification of the rights of the individual conscience in the American political creed loudly betrays its Protestant roots, even when (perhaps especially when) it is couched in denominationally neutral language.

It is important to understand how the civil religion relates to the pluralism of denominations. Thus, in one sense, the civil religion is based on a principle of religious tolerance. Except for some isolated cases (Tom Paine was one), the spokesmen of the civil religion were not only friendly to the major churches but insisted that the latter were vital to the moral health of the nation. In another sense, however, the civil religion marks the *limits* of tolerance and indeed of pluralism. While it accepts a broad diversity of religious beliefs in the society, it limits diversity when it comes to *its own* beliefs. The lines between acceptable and unacceptable diversity have frequently shifted in the course of time, but to this day the category "un-American" points to the fact that there are clearly unacceptable deviations from the common civil creed. Belief in the divine right of kings, for example, was as clearly beyond the lines of official acceptability in an earlier period of American history as belief in redemption through socialist revolution came to be later on.

Unlike some of the democratic ideologies of Europe and Latin America, democracy in the United States was not inimical to the churches. The separation between church and state in the American Constitution did not, until very recently, imply that the state must be antiseptically clean of all religious qualities—only that the state must not give unfair advantage to one denomination over another. In other words, the assumptions underlying the separation of church and state were pluralist rather than secularist. It is no accident that there is no adequate American translation of the French term *laique,* and that (again, until very recently) there was no widespread demand that the American polity should become a "lay state" in the French sense. Indeed, a good case can be made that church/state relations in this country had the character of a "pluralistic establishment": officially accredited denominations were allowed to share equally in a variety of privileges bestowed by the state. Exemption from taxation and opportunity for chaplaincy in public institutions are cases in point. Just which groups were to be regarded as officially accredited, of course, was subject to redefinition.

To put it differently, the beneficiaries of the "pluralistic establishment" have been an expanding group ever since the system was inaugurated. First were added various less-than-respectable Protestant bodies (such as the Quakers), then Catholics and Jews, and finally groups completely outside what is commonly called the Judaeo-Christian tradition. The struggle of the Mormons to obtain "accreditation" marked an interesting case in this process. Recent court decisions on what (if my memory serves me correctly) were actually called "the religious rights of atheists," as well as recent litigation by Black Muslims, mark the degree of expansion of the system to date.

Historically, then, denominational religion and civil religion have not been antagonistic entities in America. Their relationship has rather been a symbiotic one. The denominations enjoyed a variety of benefits in a "pluralistic establishment," the existence of which was not only fostered by the state but solemnly legitimated by the civil religion to which the state adhered. Conversely, the civil religion drew specific contents and (in all likelihood) general credibility from the ongoing life of the denominations. Nevertheless, each entity has had a distinct history, with different forces impinging on the one or the other. Any assessment of the contemporary situation must allow for this distinction.

II

Keeping this distinction in mind, then, let us go back to the period around 1955: what was the situation at that time?

As far as denominational religion was concerned, the market was bullish indeed. These were the years of what was then called a "religious revival." All the statistical indicators of organized religion were pointing up. Church membership reached historically unprecedented heights. Most significant (or so it seemed then), it was younger people, especially young married couples, who became active in the churches in large numbers. The offspring of these people crowded the Sunday schools, creating a veritable boom in religious education. Church attendance was up, and so was financial giving to the churches. Much of this money was very profitably invested, and the denominational coffers were full as never before. Understandably enough, the denominational functionaries thought in terms of expansion. "Church extension" was the phrase constantly on their lips. There was an impressive boom in church building, especially in the new middle-class suburbs. The seminaries were filled with young men getting ready to swell the ranks of the clergy. Perhaps they were not "the brightest and the best" among their peers, but they were competent enough to fulfill the increasingly complex tasks required of the clerical profession in this situation. In the bustling suburban "church plants" (a very common term at the time) this clerical profession often meant a bewildering agglomeration of roles, adding to the traditional religious ones such new roles as that of business administrator, educational supervisor, family counselor and public relations expert.

The "religious revival" affected most of the denominations in the Protestant camp, and it affected Catholics and Jews as well. It seemed as if everyone were becoming active in his respective "religious preference." (By the way, an etymological study of this term derived from the consumer market would be worth making some day.) It was important, therefore, that all of this took place in a context of (apparently) solidifying ecumenism and interfaith amity. The Protestants within the mainline denominations were going through something of an ecumenical orgy. There were several church mergers, the most significant of these (long in preparation) being the union between the Congregationalists and the Evangelical and Reformed Church to become the United Church of Christ. The formation of this body in 1957 was widely heralded as a landmark in the movement toward Christian unity. Quite apart from these organizational mergers, there was a plethora of agencies concerned full time with interdenominational relations, ranging from the still quite young National Council of Churches to state and local councils. While some of these agencies engaged in theological discussion, most of their work was severely practical. An important task was the one formerly called "comity" and recently rebaptized as "church planning." Especially on the local level this meant that church expansion was based on research and on agreements among the denominations not to engage in irrational competition with each other—and particularly not to steal each other's prospective members. The religious market, in other words, was increasingly parcelled out between cartel-like planning bodies (and no antitrust laws stood in the way of these conspiracies to restrain free competition). Beyond all these formal processes of collaboration, there was a broad variety of informal acts of *rapprochement*—intercommunion, exchange of pulpits, interdenominational ministries in special areas, and so on.

It should be emphasized that most of this occurred within the mainstream denominations, which had a predominantly middle-class constituency. The more fundamentalist groups, with their lower-middle-class and working-class members, stood apart, undergoing at the same time quite dramatic growth of their own. It seems that the apartness of these groups was not much noticed and even less regretted by the ecumenists: the presence of the Greek Orthodox in the National Council was noted with pleasure, the absence of the Pentecostalists was of little concern. More noticed was the new relationship to Catholics and Jews. While the Roman Catholic Church still moved slowly in those pre-Vatican II days, there was little doubt that the old hostility between the two major Christian confessions was a matter of the past. And both Protestants and Catholics habitually expressed goodwill toward Judaism and the Jewish community, not only through such organizations as the National Conference of Christians and Jews but, more important, in local churches and synagogues throughout the country. Significantly, the major Protestant denominations increasingly took for granted that practicing Catholics and Jews were not fair game for evangelistic activity, thus at least informally including them in ecumenical "comity."

In retrospect it has come to seem plausible that at least some of this religious boom was deceptive. Even then there were quite a few individuals who questioned how religious the "religious revival" really was. Several factors contributing to it had very little to do with religious motives proper—high social mobility, with large numbers of people moving into the middle class and believing that the old nexus between bourgeois respectability and church membership still held; high geographical mobility, with migrants finding in the churches a convenient symbol of continuity in their lives; the postwar baby boom, with parents feeling rather vaguely that Sunday schools could provide some sort of moral instruction that they themselves felt incompetent to give (there are data showing that frequently it was the children who dragged their parents after them into the churches, rather than the other way around). As a result of these factors, there was a good deal of what might be called *invisible secularization*. In the midst of all this boisterous activity the deepening erosion of religious content in the churches was widely overlooked.

The "religious revival" in the denominations was paralleled by an equally impressive flowering of the civil religion. These, after all, were the Eisenhower years, aptly characterized by William Lee Miller, in a famous article in *The Reporter* magazine, as "Piety along the Potomac." Indeed, it was Eisenhower himself who made statements that could be taken as crystalline expressions of the mid-1950s version of the civil religion, such as this one: "Our government makes no sense unless it is founded in a deeply felt religious faith—and I don't care what it is." The political relevance of this faith, deeply felt and at the same time seemingly devoid of content, was expressed in another Eisenhower statement: "America is great because she is good." One may call this patriotic religion or religious patriotism. Either way, the content was America—its political and social institutions, its history, its moral values, and not least its mission in the world.

The rhetoric of the national government during these years was full of such religio-political formulations. Except for a small minority of anti-Eisenhower intellectuals, the country found this rhetoric quite in accord with its mood. Despite some shocks (notably the McCarthyite hysteria and the less-than-victorious ending of the Korean conflict), the mood was still one of national self-confidence if not complacency. There was still the afterglow, as it were, of America's great victory in World War II—a most credible conjunction of greatness and goodness. The postwar American empire was going well, with American soldiers mounting the battlements of freedom from Korea to Berlin. The Cold War, if anything, deepened the affirmation of the virtues of the American way of life as against the Communist adversary. (Not the least of the latter's evils was its ideology of "godless materialism.") The economy was going well, the dollar was king, and American businessmen as well as tourists circled the globe as emissaries from Eldorado. Indeed, many of its intellectuals were celebrating America (even if, as it later turned out, some of the celebration was subsidized by the CIA).

I do not want to exaggerate. I am not suggesting that there were no tensions, no doubts, in this mood. But compared to what happened later, this period impresses one in retrospect by the apparent unbrokenness—intactness—of the American creed. Just as the imperial cult of classical Rome was sustained by the unquestioned veneration of the familiar shrines in innumerable households, so the American civil religion drew its strength from the daily matter-of-course enactment of the virtues of the American way of life by innumerable individual citizens. I would not like to be misunderstood here: I am *not* saying that there was more morality in the 1950s than there is today; I *am* saying that such morality as was practiced was taken for granted in a different way. The American virtues, and the virtue of America as a society, were still upheld in the mind of the country as self-evident truths. I suppose that this assurance might well be characterized as innocence. To a remarkable degree, this rather grandiose self-image of Americans was reflected in the way they were viewed by foreigners—not least by the two major enemy nations of World War II.

III

If that was the situation in 1955, what has happened since?

To summarize the change, I shall take the liberty of making reference to my first book, a sociological critique of American Protestantism published in 1961.[3] In this book, when describing the notion that the world is essentially what it is supposed to be, I used the phrase "the okay world." I argued that religion in middle-class America served to maintain this sense of the world being "okay." I still think this was a fair description. The change since then can be conveniently summed up by saying that more and more people have come to the conclusion that their world is *not* "okay," and religion has lost much of its ability to persuade them that it is.

In denominational religion, the changes have differed greatly by class. The Protestant groups drawing most of their membership from *below* the upper-middle class have continued to grow, some of them in a dramatic way. They have largely remained untouched by the crises and self-doubts that have lacerated their higher-class brethren. Their theological fundamentalism has been modified here and there and their organizational style has been modernized, but as far as an outside observer can judge, their self-confidence as upholders of Evangelical truth has remained largely unbroken. The picture is quite different in the mainstream denominations.

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[3] Peter Berger, *The Noise of Solemn Assemblies* (Garden City, N.Y.: Doubleday & Co., Inc., 1961).

By the mid-1960s the "religious revival" was clearly over. All the statistical indicators started ebbing or even pointing down—membership, attendance, financial giving and (logically enough) church expansion. As budgets became leaner, the denominational and interdenominational organizations were forced to cut down on program as well as staff. Seminary enrollments stayed high, but there was widespread suspicion that the automatic exemption of seminary students from the draft had much to do with this (a suspicion that appears to be borne out in what is happening in the seminaries now). The market for denominational religion, in short, was becoming bearish. Not surprisingly, its amicable management through ecumenical cartels seemed less and less attractive. There appeared a marked reluctance to engage in further mergers, characterized by some observers (perhaps euphemistically) as "a resurgence of denominational spirit." The organizational mood became one of retrenchment.

More deeply, the 1960s were characterized in mainstream Protestantism by what can best be described in Gilbert Murray's phrase as a "failure of nerve." The best-known theological movements seemed to vie with each other in the eagerness with which they sought to divest the churches of their traditional contents and to replace these with a variety of secular gospels—existentialism, psychoanalysis, revolutionary liberation, or *avant-garde* sensitivity. The "death-of-God" theology was the grostesque climax of this theological self-disembowelment. At the same time the church functionaries, increasingly panicky about the fate of their organizations, tended to jump on whatever cultural or political bandwagon was proclaimed by the so-called opinion leaders as the latest revelation of the *Zeitgeist*. As was to be expected, all these efforts "to make the church more relevant to modern society" had the effect of aggravating rather than alleviating the religious recession. Those church members who still felt loyalty to the traditional content of their faith were bewildered if not repelled by all this, and those whose membership was motivated by secular considerations to begin with often felt that such commodities as "personal growth" or "raised consciousness" could be obtained just as well (and less expensively) outside the churches. The major consequence (unintended, needless to say) of Vatican II seems to have been to spread the aforementioned Protestant miseries through the Catholic community: the "failure of nerve" has become ecumenical too. At the same time, American Judaism and the American Jewish community in general have been driven by a variety of causes into a much more particularistic and defensive posture than was the case when Herberg announced the arrival of a "tripartite" American faith.

Just as there was good reason to doubt that the "religious revival" of the 1950s was caused by some sort of mass conversion, so it is unlikely that the subsequent decline is to be explained by sudden spiritual transformations. My own tendency is to think that secularization has been a long-lasting and fairly even process, and that nothing drastic happened to the American religious consciousness either after World War II or in the most recent decade. What happened, I think, is that the quite mundane social forces that made for the "religious revival" subsequently weakened. Most important, the linkage between middle-class status and church membership weakened (something that took place in England, by the way, in the wake of World War I). In consequence, the previously invisible secularization became much more visible. If you like, secularization came out of the closet. The inability of the churches to confront the emerging skeleton with a modicum of dignity almost certainly contributed to its devastating effect.

The changes that have taken place in the civil religion, I think, resulted partly from these changes in denominational religion (inevitable in view of the symbiotic relation between the two), and partly from extraneous developments in the society. To some degree, it can be said, the American polity has become more *laique* in recent years, and I suspect that this is largely due to the more openly acknowledged secularism of that portion of the college-educated upper middle class that finances what it considers good causes—in this instance, the cause of pushing secularist cases through the courts. The Supreme Court proscription of prayer in the public schools was the most spectacular of these cases. It was an exercise in extraordinary sociological blindness, though it appears that those who advocated it have learned absolutely nothing from the outcry that ensued. The same *laique* trend may be seen in the rigid resistance to any allocation of tax funds to church schools, in threats to the tax-exempt status of religious institutions, and in current discussion of various forms of chaplaincy. More important, a militant secularism today comes dangerously close to denying the right of the churches to attempt influencing public policy in accordance with religious morality. The abortion issue illustrates this most clearly. I doubt whether the tendency of the courts to go along with the secularists has profound reasons. Most likely it can be explained simply in terms of the parties attended by federal judges and the magazines read by their wives. (I assure you that I intend no disrespect to our judiciary—actually one of our more cheering institutions—but I am too much of a sociologist to believe that its decisions are made in some judicial heaven sublimely detached from the socio-cultural ambience of its members.)

There has thus come to be a threat to the old symbiosis between denominational and civil religion in America. And a more dramatic threat has come from much larger events in the society. It has often been said in the last few years that the legitimacy of the American political order faces the gravest crisis since the Civil War. Even after making proper allowance for the propensity of professional social critics to exaggerate, the diagnosis stands up under scrutiny. To be sure, there are important class and regional differences: what is perceived as doomsday by readers of the *New York Review of Books* may seem a less than overwhelming nuisance to the reader of a small-town newspaper in Kansas, and there is hard evidence to the effect that there continue to be large masses of people whose "okay world" has *not* been fundamentally shaken. Yet few people have remained untouched by the political and moral questioning induced by the headline events of the last decade—the continuing racial crisis, the seemingly endless fiasco of the imperial adventure in Indochina, the eruption of chaos on campus, and finally the shock of the Watergate revelations. I doubt if these events, singly or even in combination, are ultimate causes of the crisis of the American political creed: I think it is more plausible to see this crisis rooted in much more basic tensions and discontents of modern society, of "revolutionary" society, and to understand the events as *occasions* for the underlying difficulties to become manifest.

Obviously I cannot develop this point here. Suffice it to say that the survival in the twentieth century of a political order conceived in the eighteenth is not something about which I am sanguine (though, let me hasten to add, I fervently believe in the continuing effort to keep this eighteenth-century vision alive). Be this as it may, we have been passing through a process that sociologists rather ominously describe as *delegitimation*—that is, a weakening of the values and assumptions on which a political order is based. We have been lucky, I think, that this malaise of the political system has not so far been accompanied by severe dislocations in the economy: I can only express the hope that our luck continues to hold.

It may then be said that the civil religion has been affected by a double secularization. It has been affected by the secularizing processes in the proper sense of the word, the same processes that have come to the fore in the area of denominational religion. But it has also undergone a "secularization"—that is, a weakening in the plausibility of its own creed, quite apart from the relation of this creed to the several churches. Put simply, the phrase "under God," as lately introduced into the Oath of Allegiance, has become implausible to many people. But even without this phrase the propositions about America contained in the oath have come to sound hollow in many ears. *That* is the measure of our crisis.

IV

However prudent one may want to be with regard to the tricky business of prediction, it is almost inevitable in a consideration such as this to look toward the future. What are some plausible scenarios?

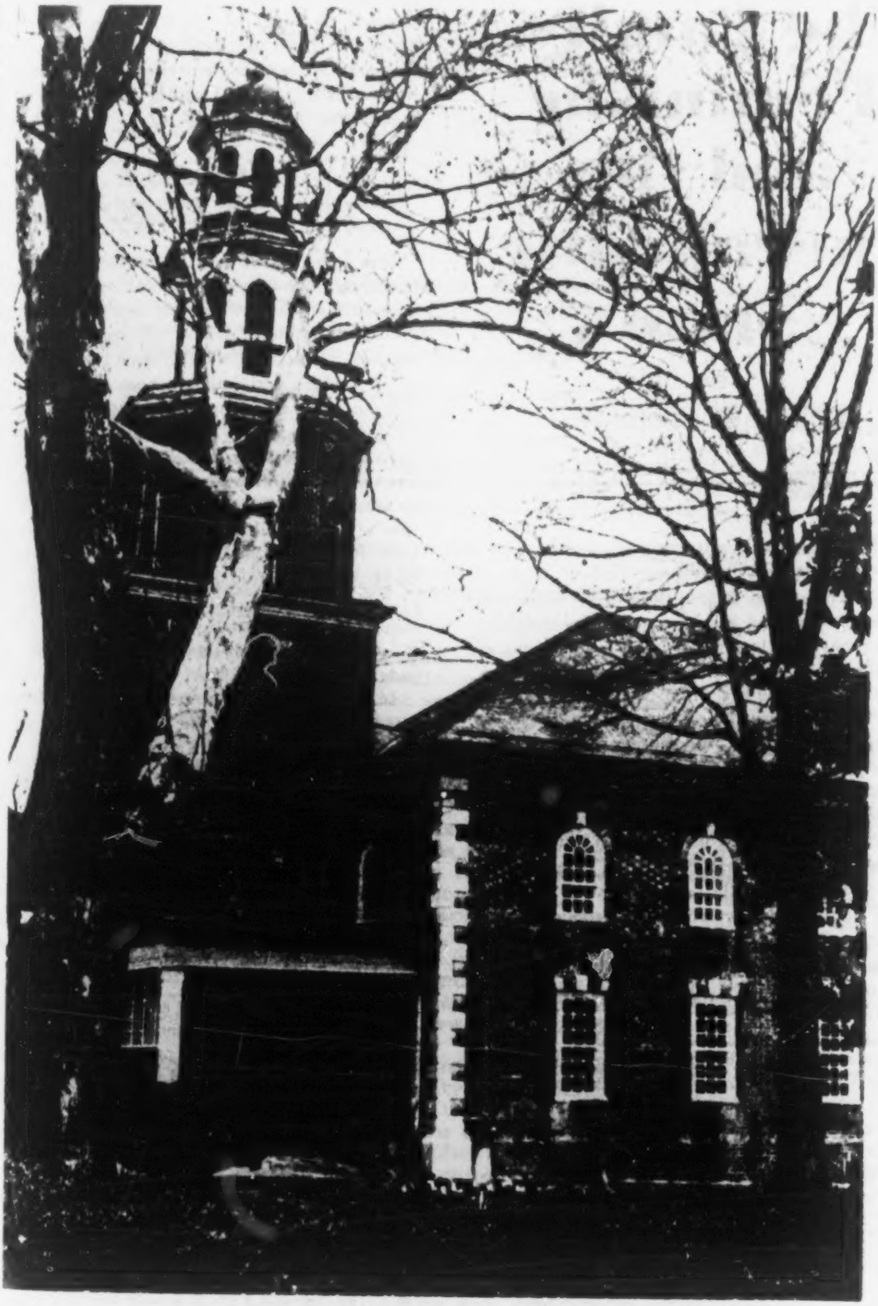
As we look at the future of denominational religion in America, a crucial consideration will be how one views the further course of secularization. In the last few years I have come to believe that many observers of the religious scene (I among them) have overestimated both the degree and the irreversibility of secularization. There are a number of indications, to paraphrase Mark Twain, that the news about the demise of religion has been exaggerated. Also, there are signs of a vigorous resurgence of religion in quarters where one would have least expected it (as, for instance, among the college-age children of the most orthodox secularists). All this need not mean that we are on the brink of a new Reformation (though I doubt if anyone thought they were on the brink of a Reformation at the beginning of the sixteenth century either), but it seems increasingly likely to me that there are limits to secularization. I am not saying this because of any philosophical or theological beliefs about the truth of the religious view of reality, although I myself believe in this truth. Rather, I am impressed by the intrinsic inability of secularized world views to answer the deeper questions of the human condition, questions of *whence, whether,* and *why*. These seem to be ineradicable and they are answered only in the most banal ways by the *ersatz* religions of secularism. Perhaps, finally, the reversibility of the process of secularization is probable because of the pervasive boredom of a world without gods.

This does not necessarily mean, however, that a return to religion would also mean a return to the churches. It is perfectly possible that future religious resurgences will create new institutional forms and that the existing institutions will be left behind as museum pieces of a bygone era. There are two propositions, though, of which I am fairly certain. First, any important religious movements in America will emerge out of the Judaeo-Christian tradition rather than from esoterica imported from the Orient. And second, the likelihood that such revitalizing movements remain within the existing churches will increase as the churches return to the traditional contents of their faith and give up self-defeating attempts to transform their traditions in accordance with the myth of "modern man."

The scenarios for the American civil religion hinge most obviously on one's prognoses for American society at large. Only the most foolhardy would pretend to certainty on this score. But one thing is reasonably certain: No political order can stand a long process of delegitimation such as the one we have been going through of late. There is only a limited number of possible outcomes to such a crisis of legitimacy. One, perhaps the most obvious one, is that the society will move into a period of general decline, marked both by intensifying disturbance within and a shrinkage of its power in the world outside. Not much imagination is required to see what such a decline would mean internationally. A second possible outcome is a termination of the crisis by force, by the imposition of the traditional virtues by the power of the state.

It hardly needs stressing that democracy and freedom, as we have known them, would not survive such an "Augustan age" in America. The third possibility is a revitalization of the American creed from within, a new effort to breathe the spirit of conviction into the fragile edifice of our political institutions. This possibility depends above all on political and intellectual leadership, of which there is little evidence at the moment. The future of the American experiment depends upon a quick end to this particular scarcity and upon the emergence of an altogether new unity of political will, moral conviction, and historical imagination—in order to preserve the society descending from our Revolution.

I have tried here to sketch a picture, not to preach a sermon. The social scientist, if he is true to his vocation, will try to see reality without reference to his own hopes or fears. Yet it must be clear that I do not view this particular scene as a visitor from outer space. On the contrary, I find myself deeply and painfully involved in it. As a sociologist I can, indeed must, look at the religious situation in terms of what a colleague has aptly called "methodological atheism." At the same time, I am a Christian, which means that I have a stake in the churches' overcoming their "failure of nerve" and regaining their authority in representing a message that I consider to be of ultimate importance for mankind. I suppose that a phrase like "methodological subversion" would fit the manner in which, again of necessity, the social scientist looks at political reality. With some mental discipline, then, I can try to describe contemporary America as if it were ancient Rome. But I cannot escape the fact that I am an American citizen and that the future of this society contains not only my own future but that of my children. Even more important, I happen to believe in the continuing viability of that eighteenth-century vision and in the promise implied by that oath—in my own case, first taken freely and of my own volition as an adult. Both for the religious believer and for the citizen, the assessment that I tried to make here translates itself into practical and political tasks. The elaboration of these tasks, however, would require a different format from the present one. In any case, it was not my assignment here.



Christ Church in Alexandria,
Virginia, is the church where George Washington
worshipped on his return from the war, Christmas Day, 1783
and where Robert E. Lee was confirmed.

The Family, Feminism and the Therapeutic State

by

ONALEE McGRAW

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The Sex Education Controversy: Whose Values Will Prevail?

As we enter the decade of the 1980s, proponents of the "new sex education" are mounting their second nationwide offensive to establish their vision of sexuality in comprehensive sex education courses in the schools. The first offensive took place in the late '60s and early '70s, spearheaded by Mary Calderone and the Sex Information and Education Council of the United States, and backed by policies and grants from HEW. This first offensive was not completely successful, as many communities erupted in intense controversy. When the dust had settled only a small number of communities had actually adopted the comprehensive "new sexuality" approach. According to prominent sex educators Peter Scales and Sol Gordon, who addressed their colleagues at the Wingspread Conference on Early Adolescent Sexuality and Health Care in June 1970:

> We must stop pretending that school sex education already exists; aside from a few isolated programs, little but the "plumbing" and biological facts are being taught. The best estimates are that fewer than 10 percent of the nation's young people receive anything remotely approaching adequate sex education in the schools."[67]

In *The New Sex Education: The Sex Educator's Resource Book*, the editor, Herbert A. Otto, gives an enlightening exposition of the "system of values" the new sex education entails. Otto, whose "credentials" include membership in the Society for the Scientific Study of Sex and the American Association of Sex Education, Counselors, and Therapists, defines the "new sexuality":

> Today, sexuality is seen as an important aspect of healthy personality functioning, as enhancing the quality of life and fostering personal growth, and as contributing to human fulfillment."[68]

Otto sums up the new sex education which embodies the following propositions: sexual health as an important aspect of total health; recognition that a multitude of sexual life styles reflects the needs of a pluralistic society; open communication in all matters pertaining to human sexuality—in and out of the classroom, including the total range of sexual terminology, street language and four-letter words utilized as part of the teaching process; birth control information routinely made available; an emphasis on building healthy attitudes; utilization of explicit films and new teaching methods such as group discussion and values clarification; emphasis on the role of values and a presentation of sexual life-styles including homosexuality, lesbianism and bisexuality, with an emphasis on understanding and the development of non-judgmental attitudes."[69]

In the state of New Jersey, the new sex education has been mandated by the state board of education. Other states like California and Ohio are undergoing preparations for new statewide efforts to install it. With the backing of federal funds, the national PTA is renewing its intensive drive to place sex education in America's schools. The national PTA has received a $432,000 grant from the center for Disease Control to develop a Comprehensive School/Community Health Education Project. The national PTA is operating on the assumption that

> Such cooperative, planned education for positive sexual attitudes and self-understanding can contribute to the prevention of many of the social and medical problems associated with early pregnancy, venereal diseases, and emotionally crippling sexual dysfunctions."[70]

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68. Herbert A. Otto. ed., *The New Sex Education The Sex Educator's Resource Book* (Chicago: Follet Publishing Company, 1978), p. ix.
69. *Ibid.*
70. "The National PTA Comprehensive School/Community Health Education Project Report." National PTA, 700 North Rush Street, Chicago, Illinois, 60611.

FIGURE-8

FIGURE-9

MEMORANDUM FROM YALE LAW SCHOOL

Date: April 27, 1978

To: The Faculty

From: Robert H. Bork

I am unable to attend the faculty meeting today, but I want to express my opposition to the proposal that the Yale law school deny employers the privilege of interviewing students on law school premises if the employers display any reluctance to hire and promote homosexuals.

There is no need to rehearse at length the intellectual emptiness of the arguments put forward on behalf of this proposal. Contrary to the assertions made, homosexuality is obviously not an unchangeable condition like race or gender. Individual choice plays a role in homosexuality; it does not in race or gender; and societies can have very small or very great amounts of homosexual behavior, depending upon the degrees of moral disapproval or tolerance shown.

It is a mere play on words to say that homosexuality refers to status rather than conduct. The status is defined, as a student reminded us at our last meeting, by involvement in the behavior. That behavior, it is relevant to observe, is criminal in many States.

The observation that the homosexuals in question are our students, and we did not make heterosexuality a condition of entrance to Yale, provides no premise for the further argument that we must, for that reason, bar all law firms or other employers that do have an objection to homosexuality. We do not make any number of characteristics that employers might find relevant conditions for admission to Yale. Our policies, or neutralities, do not automatically become obligations of employers.

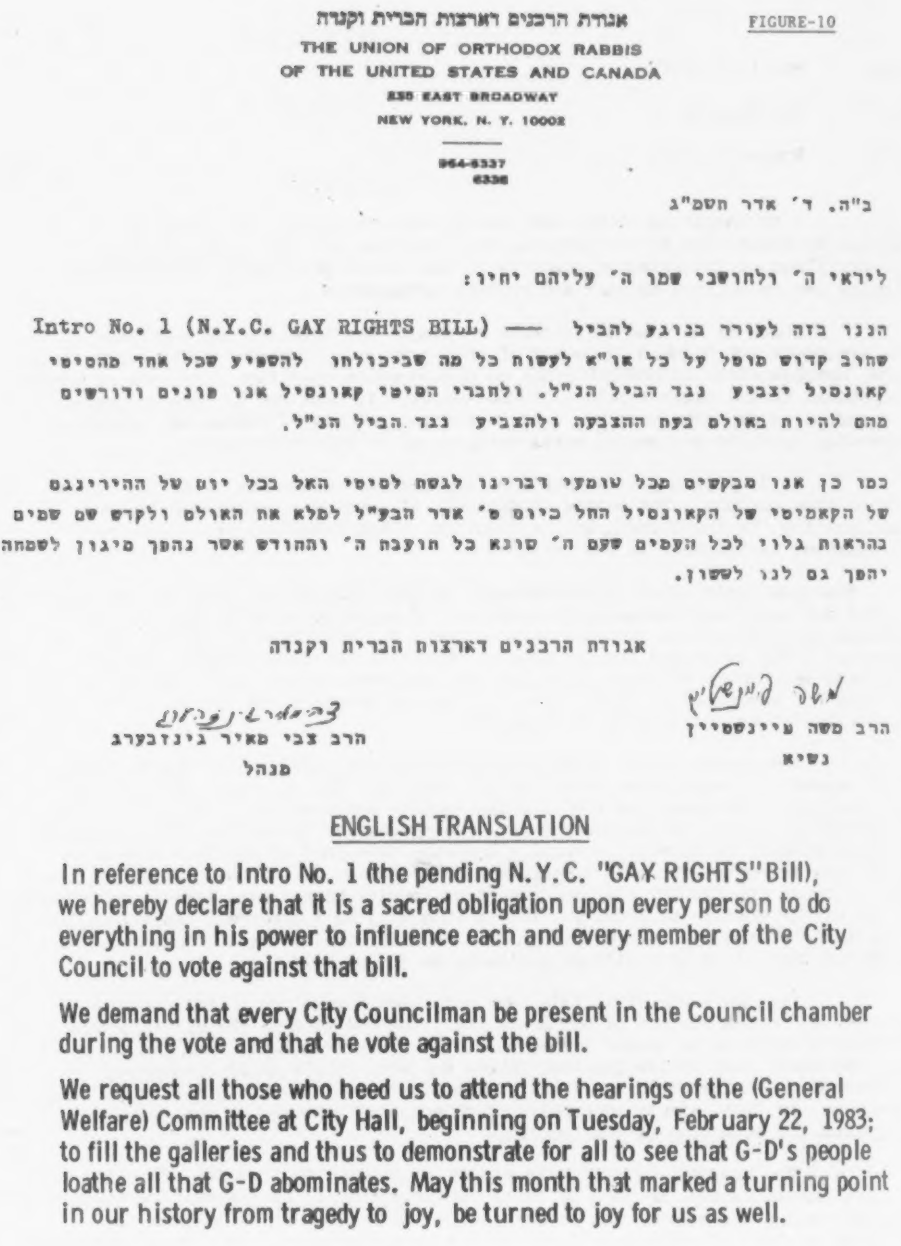
The proposed rule does not relate to educational policy and is therefore beyond the legislative powers of the faculty. The rule would be a moral or political statement that the Yale law faculty approves of homosexual behavior so strongly that it is prepared to say no employer may disapprove without thereby marking himself or herself as morally unworthy to appear on the Yale campus to interview students. This is a statement and a ruling so far beyond any legitimate authority of the faculty that no dissenting faculty member need feel himself bound by it either morally or legally. This action will be a precedent indistinguishable in principle from any future attempt by a majority of the faculty to purport to bind the rest of us to political positions we do not hold.

Employers who visit Yale have not shown themselves to be intrusive or repressive on the subject of homosexuality. The position of the military that they will not hire an avowed homosexual is entirely reasonable, and the private bar has shown very little interest in the subject. While moral disapproval of homosexual behavior would not justify offensive inquiries during interviews here, there is, in fact, simply no problem of objectional behavior by employers that requires the attention of the faculty.

The proposal before us is simply an attempt to have this faculty ratify homosexuality, to have us state publicly that it is immoral for society to have any preference on the matter. I do not believe it is immoral for society or for individuals in it to have such preferences. But, more importantly, I am sure that political statements of this nature are not the business of the faculty of the Yale law school acting in its corporate capacity. Such an action wrongfully uses the prestige of the entire faculty as support for a political position held only by some.

Adoption of this proposal is a long step in the direction of making political viewpoint explicitly relevant to membership on the faculty. That ought not be done.

FIGURE-10



אגודת הרבנים דארצות הברית וקנדה
THE UNION OF ORTHODOX RABBIS
OF THE UNITED STATES AND CANADA
235 EAST BROADWAY
NEW YORK, N. Y. 10002

964-6337
6338

ב"ה, ד׳ אדר חשמ"ג

ליראי ה׳ ולחושבי שמו ה׳ עליהם יחיו:

הננו בזה לעורר בנוגע להביל Intro No. 1 (N.Y.C. GAY RIGHTS BILL) —— שחוב קדוש מוטל על כל או"א לעשות כל מה שביכולתו להשפיע שכל אחד מהסיטי קאונסיל יצביע נגד הביל הנ"ל. ולחברי הסיטי קאונסיל אנו פונים ודורשים מהם להיות באולם בעת ההצבעה ולהצביע נגד הביל הנ"ל.

כמו כן אנו מבקשים מכל שומעי דברינו לגשת לסיטי האל בכל יום של ההירינגס של הקאמיטי של הקאונסיל החל כיום ט׳ אדר הבע"ל למלא את האולם ולקדש שם שמים בהראות גלוי לכל העמים שעם ה׳ סונא כל תועבת ה׳ והחודש אשר נהפך מיגון לשמחה יהפך גם לנו לששון.

אגודת הרבנים דארצות הברית וקנדה

משה פיינשטיין
הרב משה פיינשטיין
נשיא

צבי מאיר גינזבערג
הרב צבי מאיר גינזבערג
מנהל

ENGLISH TRANSLATION

In reference to Intro No. 1 (the pending N.Y.C. "GAY RIGHTS" Bill), we hereby declare that it is a sacred obligation upon every person to do everything in his power to influence each and every member of the City Council to vote against that bill.

We demand that every City Councilman be present in the Council chamber during the vote and that he vote against the bill.

We request all those who heed us to attend the hearings of the (General Welfare) Committee at City Hall, beginning on Tuesday, February 22, 1983; to fill the galleries and thus to demonstrate for all to see that G-D's people loathe all that G-D abominates. May this month that marked a turning point in our history from tragedy to joy, be turned to joy for us as well.

Library of Congress Cataloging-in-Publication Data
Gilder, George F., 1939-
Men and marriage.

Rev. ed. of: Sexual suicide. 1973.

Although the Williamsburg sociologists and economists will never acknowledge it, the U.S. does not suffer significantly from a problem of race or of poverty. Our problem is far worse: a crippling plague of broken families. The best way to alleviate it is to offset the influence of perverse welfare and tax incentives through economic growth and child allowances. There is no other way.

Ironically, however, the sociologists are correct on one important point. They are right that the wreckage of the ghetto and beyond cannot be explained or solved by economic incentives and support systems alone, particularly those focused on the ghetto itself. Together with the punishing combination of tax penalties and welfare benefits, the lower-middle-class family, black or white, must try to steer its children through a treacherous cultural arena in which traditional roles and disciplines are under continuous attack. Teachers, textbooks, television programs, and films all tend to show heavy feminist influence. Sex-education courses take fornication for granted, deny the differences between the sexes, and even arouse unnecessary fears of homosexuality in normal boys. Contraceptives are distributed widely without parental consent. Religious values of abstinence and sacrifice give way to "values clarification" and feel-good moral codes. The only clear moral imperative conveyed by the usual text in social studies is the bogus "crisis" of overpopulation and the need for small families.

Since these pressures pervade the society, mobilizing against them can be a new "unity," joining all races and creeds across the country. What is needed is a broad effort, embracing churches, schools, and businesses as well as government, to restore the primacy of family values. Out-of-wedlock births should be delegitimized again, and marriage with children restored to its necessary centrality in our national life.

Most crucial of all is the role of the churches. Several sociological studies have shown that churchgoers have sharply lower levels of illegitimacy and divorce than others in the population. The problems of the American poor are most fundamentally moral and spiritual. As Margaret Mead insisted, stable families—with long time horizons and a resistance to the buffeting of life's inevitable troubles—ultimately depend, in all societies, on the reinforcement of religious beliefs and ceremonies.[14] Without a strong religious culture a secular bureaucracy, with its rationalizing ethic, erodes the very foundations of family life and thus creates the very moral chaos it ostensibly combats. The effort to inculcate ethical behavior without religious faith seems one of the great fiascoes of the modern age. If the established churches are truly concerned with the problems of poverty, they will abandon their current tendency to serve as shills for the demoralizing materialism of the welfare state and return to their paramount role, giving moral and spiritual guidance to the poor, and to all American society.

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1. Quoted in *The Negro Family, A Case for National Action*, as reprinted in Lee Rainwater and William L. Yancey, *The Moynihan Report and the Politics of Controversy* (Cambridge, Mass.: MIT Press, 1967), p. 63.

SOCIETAL RIGHTS AND HOMOSEXUAL RIGHTS
ANALYSIS OF A CONFLICT

Presented For Consideration By The
Commission On Legislation And Civic Action

Of The

AGUDATH ISRAEL OF AMERICA

Prepared By: Dr. Bernard Fryshman
May 28, 1985

FIGURE-12

I. INTRODUCTION

Admittedly, the pleas come properly clothed...

Words like "rights," "discrimination," and "minority" trigger all the expected responses; appeals to fairness, to compassion, and to reason produce all the right reactions. It doesn't seem to make a bit of difference that empirical evidence contradicts the contention of our homosexual friends that they constitute an oppressed group deserving of special attention.

We remain entangled in a web of simplistic assumptions, unexamined hypotheses, and glib non-sequiturs; our critical faculties dulled by an onslaught of noble sounding words.

The ensuing support was quite predictable

Some legislators anxious to curry favor with a powerful, special interest group found refuge in the intellectual framework developed. Well-meaning citizens unable to delve beyond the facade of reasonableness projected by homosexual advocates took up the cause and similarly pressured their own political representatives to support "gay rights." And,truth-to-tell, there are many decent legislators who sinceraly believe that society will not suffer any harm should the proposed changes come to fruition.

It is difficult to dispel the effect of a simplistic call for "gay rights," especially when faced with an impatient and largely unsympathetic press. So much so, that decent citizens see little if any reasoned opposition to the strident cries of the homosexual community.

But all is not lost

Parents, religious leaders, courageous legislators and ordinary citizens who cherish traditional values have let themselves be heard - often in the face of threats of violence. This effort has suffered for lack of material which carefully examines and rebuts the claims of the "pro-gay" advocates. Nor has there been a concise presentation of the reasons that so many decent people are vigorously opposed to creating special "rights."

It is hoped that this piece will encourage others to produce similar expositions of the issues involved, and ensure that quiet reason and controlled debate will govern the battle over "gay rights."

II. AN EXAMINATION OF SOME CONTENTIONS, ASSERTIONS, AND TRUTHS

Homosexuals do not constitute a "minority"

Homosexuality is not characteristic of a minority, quite unlike race which is. Homosexuality is a behavior pattern, and practitioners have no call upon society for special consideration or sympathy.

> *To help put the matter into perspective, we might envision a time when individuals who engage in polygamy (or incest) might organize, allow themselves to be arrested on behalf of their "orientation" and then play on the sympathies of a kindly populace to come to the aid of this new "minority" and its "rights".*

It is, of course, correct to say that there are fewer homosexuals then there are normal people, but in view of the fact that the interaction that most concerns parents is that between young impressionable boys and older sophisticated adults, the word "minority" loses much of its meaning in this respect as well.

Nobody is discriminating against homosexuals

Unlike racial minorities whose physical characteristics distinguish them from the majority population, and unlike members of some religious communities whose garb, practices and surnames often identify them as such, there is no inherent way to identify any given person as a homosexual. That being the case, how can one deny employment or otherwise discriminate against an undeclared homosexual, even if one wanted to do so? Indeed, homosexuals occupy positions at all levels of the economy, in every industry, and in most staid and proper environment.

What homosexuals are seeking is not jobs

The homosexual movement is not requesting the right to practice, in private, a certain life style. Rather it wants society to attest to this behavior as acceptable and legitimate. Homosexuals want to be able to proselytize and induce others to join them; to convince younger people "homosexuality" is a way of life.

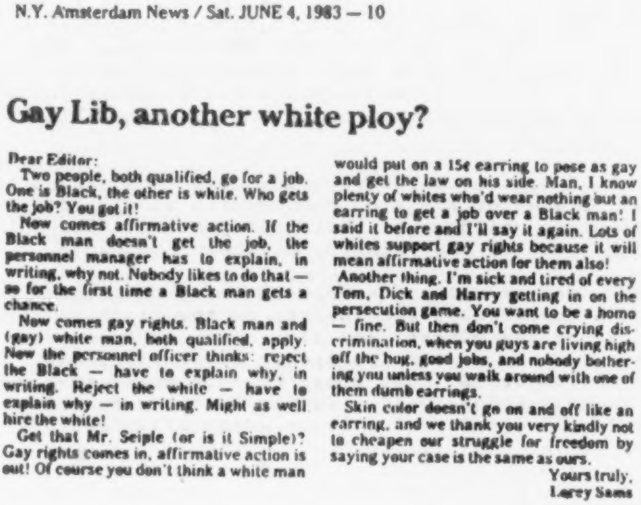
Even a casual perusal of "gay" literature and writings indicates that they are looking to have society define this deviant life style as a normal alternative. To use their words, they want to be able to convince all elements of society - even children - that "gay is as acceptable as straight."

But they will welcome "Affirmative Action" for homosexuals, nonetheles

Although they have not suffered discrimination in the past and although their goals are not job oriented, it is clear that homosexuals will not be adverse to taking full advantage of affirmative action programs which will inevitably follow passage of any "gay rights" bill. Some pro-gay groups, look forward to the time when employers, including parochial schools, private camps, and youth centers, will be forced to maintain records that homosexuals have been hired in numbers consistent with their proportion of the population.

Whether or not any given "gay rights" bill expressly requires affirmative action is completely besides the point. We have seen court ordered affirmative action programs follow closely on the heels of other equal rights legislation, and the homosexual community will not be long in demanding affirmative action to remedy (claimed) past discrimination against them. Certainly, the economic and legal pressure being exerted even now to induce textbook publishers to present homosexuals in a favorable light is one indication of what we can expect.

The views of a member of the Black community regarding all this are instructive.



N.Y. Amsterdam News / Sat. JUNE 4, 1983 — 10

Gay Lib, another white ploy?

Dear Editor:

Two people, both qualified, go for a job. One is Black, the other is white. Who gets the job? You got it!

Now comes affirmative action. If the Black man doesn't get the job, the personnel manager has to explain, in writing, why not. Nobody likes to do that — so for the first time a Black man gets a chance.

Now comes gay rights. Black man and (gay) white man, both qualified, apply. Now the personnel officer thinks: reject the Black — have to explain why, in writing. Reject the white — have to explain why — in writing. Might as well hire the white!

Get that Mr. Seiple (or is it Simple)? Gay rights comes in, affirmative action is out! Of course you don't think a white man would put on a 15¢ earring to pose as gay and get the law on his side. Man, I know plenty of whites who'd wear nothing but an earring to get a job over a Black man! I said it before and I'll say it again. Lots of whites support gay rights because it will mean affirmative action for them also!

Another thing. I'm sick and tired of every Tom, Dick and Harry getting in on the persecution game. You want to be a homo — fine. But then don't come crying discrimination, when you guys are living high off the hog, good jobs, and nobody bothering you unless you walk around with one of them dumb earrings.

Skin color doesn't go on and off like an earring, and we thank you very kindly not to cheapen our struggle for freedom by saying your case is the same as ours.

Yours truly,
Larry Sams

Shouldn't they have the right to live "as conscience dictates?"

It would require a major intellectual tour de force to place a behavior pattern such as homosexuality into the category "as conscience dictates". Indeed even in the case of religious practice, an area specifically singled out by the Founding Fathers for special protection and consideration, society reserves the right to restrict practices it feels are repugnant or threatening. The example par excellence is the practice of polygamy by certain religious groups - now against the law.

Nowhere is the right to practice homosexuality "enshrined by law"; there is no right to practice "as conscience dictates" - and there is certainly no justification for society to view as "legitimate and normal" a practice which, until very recently, was against the law!

An effort is sometimes made to characterize homosexuality as but another "life style" - just as religion, creed, and belief are "life styles". Actually of course, religion, creed, and belief are legally, philosophically, and practically quite different from a "life style" or behavior pattern".

Homosexuals already have the Freedom to Practice

Court decisions have established unequivocally that private homosexual activities between consenting adults are not in violation of the Law. "Gay Rights"bills, then, are not necessary to "get the government out of the bedroom".* Having established that the government not interfere with their freedom to practice, they seek to ensure access of avowed homosexuals to positions which bring them into contact with an unwitting (and unwilling) citizenry.

The main area of contention between advocates and opponents of "gay rights" is whether admitted homosexuals should have the right to influence children to their perspective. The following will highlight some of the thinking of these opponents.

> *Consider, for example, the case of Jerry the school bus driver, a homosexual, who insists on the right to "come out of the closet" and also continue to serve as a bus driver, even while openly advertising his aberrant life style. His young charges might then come to think that homosexuality is not quite as terrible as people thought it was because after all, "Jerry the bus driver does it too."*

---

* But not entirely. Our system of government is value based, and there are behavior patterns which we as a nation can decide we cannot condone. The Constitution, no less than any other social contract, enables us to place restrictions on an individual's "freedom of action". These restrictions, incorporated into law, can restrain an individual's "freedom" - even if action takes place in one's own home. Incest is a perfect example of a practice which is against the law. Homosexuality, until just recently also fell into this category.

> *It goes without saying that individuals with a propensity to other aberrative practices should not be permitted to interact with impressionable children. Children may come to respect them as decent, normal human beings, and by transference, come to view their aberrative practices as normal, as well.*

Homosexuals aren't denied Freedom of Speech and Expression

Homosexuals constitute a powerful, influential movement; they are free to run a "Gay Rights Parade"; to publish magazines, books, and newspapers; and to run openly for public office. It comes with poor grace for homosexuals to claim that they have been denied freedom of speech and expression. Indeed those who have tried unsuccessfully to publish views opposed to gay rights would claim that sometimes quite the reverse is true.

Nor is the above list an exhaustive one. Homosexuals have unlimited free access to the market place of ideas. Television, movies, libraries (including the children's!), and discussion shows are but a few of the other vehicles used by homosexuals in projecting their views. Since members of the public are free to accept, reject or ignore this material, there cannot be any basis for challenging their constitutional right to protect their views in any of the above ways.

Claims that homosexuals have been denied freedom of speech and expression are patently absurd.

A limitation which is in effect

The Constitution guarantees everyone freedom of speech and expression. It doesn't guarantee that a declared homosexual be allowed to occupy a job which would force children to be exposed to beliefs and ideas which are destructive of the values instilled by parents. There is, after all, a public interest in protecting children. Thus, while the courts have been extremely reluctant to curtail the publishing activities of certain pornographers, they have supported laws which force newsstands selling certain material to display them in a manner which makes them unavailable to children.

No doubt there is a clash of interests. Freedom of speech is, after all, one of our most cherished rights. But the need to protect children is no less a societal imperative. So that it is perfectly in order for society to ensure that certain sensitive positions not be filled by an individual who would use his/her job as a vehicle to advocate behavior which is at variance with the interests of society. Fortunately there is a way out of this impasse. A homosexual who doesn't declare his propensity has access to each and every position available. As noted earlier, discrimination simply doesn't take place for the undeclared homosexual.

To reiterate,a compelling State interest dictates that there be a limitation to employment for individuals whose very act of declaring himself to be homosexual can sometimes result in the proselytizing of young people.

This limitation is not arbitrary, nor capricious, nor malicious. Just one example will suffice to illustrate why society dare not provide a conduit for homosexuals to spread their views and attitudes to individuals - among them children - who can not assimilate these ideas in a mature manner.

> *A person enters a hospital in a relatively defenseless state; whether he/she suffers from physical illness, mental illness, whether or not with associated pain, the consumer of hospital services is usually beset with anxiety, fear, depression and a feeling of helplessness. Loneliness and boredom are but two other factors which can convert an alert adult to an easily manipulated patient. Children in a hospital are all the more susceptible to any and all external influence.*
>
> *By virtue of a "gay rights" bill hospital employees could openly identify themselves as homosexuals; they could,in conversation, advocate their "alternate lifestyle", they could join their colleagues in cultural groups, they could advertise their activities and views on hospital bulletin boards, use hospital facilities for seminars and the like. Each act would lend stature to a heretofore 'despised perversion' and because of their authority in a hospital setting, they would be in a position to influence numerous malleable people in their charge.*
>
> *Consider the child watching his parents defer, respect, obey and even honor a doctor who openly identifies himself as a homosexual. Does this not seem to presage a decrease in the distaste and aversion to the very concept of homosexuality that used to discourage experimentation and involvement of young boys in this practice?*

III. THE NATURE OF THE CONFLICT

Homosexuals already have all the rights they are entitled to as citizens of the United States. They do not, of course, have the approbation of society for their deviant practice; they do not have the cachet of normalcy and legitimacy. And they do not, as yet, have the ability to occupy any and all jobs even while openly declaring themselves to be homosexual.

Not withstanding the rhetoric, then the struggle is not one of giving homosexuals their "rights". Nor is it one of jobs. For the undeclared homosexual there is no discrimination and there are no changes which a "gay rights" bill would induce. It is less than honest for advocates of a "gay rights" bill to characterize this kind of legislation as being needed to help the undeclared homosexual. Rather the intention is to enable individuals to publicly identify themselves as homosexual, to project their views and indeed to proselytize and still retain the right to any and all jobs, no matter how sensitive. Society has moved to the point where publicly declared homosexuals have unfettered freedom of speech; society has moved to the point where undeclared homosexuals have access to any job. The only limitation society has kept in place for the protection of children is to restrict access to certain kinds of employment for declared homosexuals.

This is the precise issue which separates those of good will who oppose "gay rights" bills, from those who support such legislation. Of course the homosexual movement has a much broader agenda. For them such a bill would be a further means of pressuring society into placing an implicit stamp of approval upon a practice which most people view as a perversion. Provided this narrow area of difference between two camps is kept in mind, the emotion this issue sometimes raises, can be avoided.

IV. "GAY RIGHTS" LEGISLATION WOULD HURT CHILDREN

Children: 'Impressionable, Malleable, and Gullible'

Consider that children - especially young boys - are curious; they experiment, they grope, they are adventurous. Boys are impressionable, malleable and gullible. Boys look up to the men around them - especially men with authority, no matter how meaningless this authority is to the rest of us.

Our children view society - and what is decent and moral - from a perspective different than ours. We were raised in a society where decent people reacted with revulsion at the mere mention of certain practices. As youngsters, we could not conceive of students living in co-ed dormitories, of businessmen being served by naked waitresses, or of medical students eating human flesh. The unthinkable is now the ordinary, the accepted, the usual. We are not shocked, we are not outraged - even though we were conditioned by the mores of an earlier age. Now consider children - whose minds are filled with ever-expanding vistas of all kinds. Will a child brought up in the '80's view anyting as being "unthinkable"? We adults will likely continue to regard homosexuality as a perversion, an aberration, an abhorrent, unthinkable practice. Will our children - if society stamps homosexuality as being 'acceptable'?

Puberty brings with it pressures, trials and vexations which can be challenging and confusing. The fact is, of course, that most young boys pass through this period without harm. It is also a fact that "fear of sin" does not always suffice to keep a young boy on the straight and narrow. That more youngsters do not experiment with homosexuality is often due only to the fact that society has labelled it a perversion, an abnormal deviation, an unnatural abberation.

Should we now label homosexuality as an acceptable way of life; should we permit homosexuals to promote their way of life; does anyone doubt that there will be vastly increased homosexual activity among young boys?

Children: Exposed to influences all around them

Nobody is immune to exposure to homosexuals. The most sheltered child is in contact with teachers, doctors, male nurses, inspectors, janitors, cooks, deliverymen, repairmen, bus drivers, gym instructors, neighbors, dentists, storekeepers, cleaners, park attendants, taxi drivers, meter readers, landlords, tenants, police officers, lifeguards, counselors, maintenance workers...

We are somewhat secure that none of the above people is currently able to proselytize, to promote homosexuality, or to dissipate the aura of disgust which decent people now feel towards homosexuality. Should the law change, however, they will be free to reach our children with their view that there is nothing wrong with homosexuality.

Children under the influence or control of local officials could, willy-nilly be exposed to views and pressures completely at variance with the ideas parents try to instill. Surely society cannot allow young people to be exposed to ideas and practices which might cripple them for life:

> *Consider susceptible young men and women discussing their emotional problems with psychiatrists, psychologists and counselors who happen to be homosexuals. In view of the fact that there is scientific evidence that homosexuality can be induced, are not the possible outcomes of this new policy harrowing?*
>
> *Can parents continue to entrust physically ailing children to a hospital which might result in the children emerging with bodies healed and minds warped?*
>
> *Hospitals have traditionally taken steps to protect females against the possible attack of uncontrolled male heterosexual individuals. Have hospital staffs been alerted to the fact that there are homosexuals whose attraction to men and to boys is such as to cause them to act in an uncontrolled manner? To put the problem into extreme perspective, will hospitals be forced to hire male homosexual nurses?*

Homosexuals: How to proselytize without really trying

Note that for a homosexual who serves as a role model for children to spread his way of life it is not necessary that he actively proselytize:

> *Jerry, the bus driver, is friendly with the kids - some of whom idolize his ability to manipulate a bus and control a busload of people. Jerry need not say to the kids, "Why not try homosexuality - it's fun"; he only has to say in passing, "What's wrong with homosexuals? I'm a homosexual." For some children, that kind of comment is more than enough.*
>
> *Nowadays of course, Jerry would not dare make that kind of statement. But in an atmosphere created by passage of a "gay rights" bill he would be able to say it with impunity. The number of prestigious people who will "come out of the closet", the "couples" who will openly live together; the schoolbooks which will project homosexuality as an acceptable alternative will play havoc with children's minds. Certainly the negative characteristics of homosexuality will be no more.*

The examples go on and on - homosexuals who at present pose no danger, but whose "coming out" could devastate some children should the law be changed.

> *Diana is an outstanding nurse in a busy dental practice. All the kids love her - especially the 10 and 12 year olds who idolize her for her efficiency, and for her beauty. One day Diana comes into the office wearing a button that says "Lesbian love is true love". Under current law, she could be asked to leave; should the law be changed, there is no way Diana could be dismissed - or stopped from influencing those young patients that continue to come to this dentist.*

Is it not the disgust, the societal labeling as perversion, the fact that normal people everywhere consider these practices as deviant, as abominations, and as abnormal that is perhaps the greatest protection for our children? Is this not what differentiates, in the minds of some young people, the sexual experimentation of one kind that they do engage in, and homosexuality which remains largely untouched?

Homosexuality can be induced

Investigators have been grappling with the problem of what induces homosexuality for well over a generation. There is a respected and responsible school of thought which brings compelling evidence that homosexuality can be induced. Heterosexual behavior is, after all, natural and dictated, in large part by the biological instincts of each human being. But only in large part. There is a not insignificant portion of the population which remains heterosexual only because at critical times in their development the societal aversion to homosexuality prevents them from following propensities in that direction.

Indeed, there is ample evidence that perfectly normal children can, with the wrong kinds of influences, be induced to become homosexuals. We will note only a few authorities on the subject:

> *Dr. Laurence J. Hatterer of the Payne Whitney Psychiatric Clinic at New York Hospital: "Identity of gender and erotic response is formed over a lifetime of experience including sexual patterning and imprinting" (quoted in New York Times 4/18/79).*
> *Dr. William H. Masters and Virginia E. Johnson reported on their success in reversing homosexuality in patients ("Homosexuality in Perspective" (1979). In an NBC 'Meet the Press' Interview shortly after, they were quoted by UPI - 4/23/79 - as saying "We are and we are not genetically determined to be heterosexuals; we're born man, woman and sexual beings. We learn our sexual preferences and orientations."*
> *Dr. A. Nicholas Groth, Clinical Psychologist, director of the sex offender program at the Connecticut Correctional Institution at Somers (quoted in the New York Times, 1/4/83) "said that 80% of the sex offenders he has studied had themselves been sexually abused as children".*

There is vast scientific literature on the subject supporting the thesis that homosexuality is not genetic in nature, but is rather an acquired behavior. The following is but a representative sample:

> *Gender and Disordered Behavior - by Edith S. Gromberg and Violet Franks (Brunner/Mazel, New York, 1979); and New Directions in Childhood Psychopathology - by Saul I. Harrison and John F. McDermott, Jr. (International Universities Press, New York, 1980).*
>
> *A recent review article entitled "Adolescent Homosexual Patterns: Psychodynamics and Therapy" by Lillian H. Robinson (pages 423-436 in Adolescent Psychiatry Vol. VIII, 1980) is helpful, partly because of a rather extensive bibliography. Among others Dr. Robinson reports on the work of Dr. S. Fraiberg ("Homosexual conflicts in adolescence" - in S. Lorand and H.I. Schneer, eds. Psychoanalytic Approach to Problems and Therapy. New York: Harper, 1961) who concludes that "there is a good possibility of changing the orientation while anxiety and guilt about homosexual tendencies are still present."*

With so much scientific evidence for the thesis that homosexuality can be induced, we must question why we are rushing to make a change in societal mores which could conceivably induce large numbers of young children to homosexual experimentation. Without question we are risking the emotional health and stability of young people.

Children as an 'Endangered Species'

In view of the fact that there is a strong body of opinion that homosexuality can be induced in a child, it would seem that any change in the status quo be postponed until such time as there is unequivocal scientific evidence that children will not be adversely affected.

> *Before building a dam, we must ensure we will not destroy the habitat of a rare fish; to construct a building, we must submit an environmental impact statement; to locate a water sewage treatment plant, we dare not disturb a site of archaeological importance.*

Some people propose to alter the total psychological and sociological climate in our society. Should they not first establish there will be no damage to that most endangered species of all - young children.

Admittedly, Homosexuality is not the only danger

A teacher or other adult advocating (in its broadest sense) 'free love' should certainly not have access to impressionable individuals. But even if a child is somehow diverted into this kind of behavior, the permanent consequences are nowhere as severe as they would be were he to adopt a homosexual way of life.

Free love leads to immorality and to licentiousness. But practitioners of free love can ultimately marry and raise normal families. A person who becomes a homosexual has been crippled in a way which medical science has, as yet, been unable to address.

Furthermore, the heterosexual does as a rule not proselytize. Every child is the offspring of heterosexual individuals and these individuals are anxious that their children be brought up to be a normal heterosexual person.

The homosexual, however, to justify his activities or practices, must try to establish the legitimacy of his/her views and therefore will actively seek to project them on others be they adult or child. In other words heterosexuals have no need or desire to project their views of proper sexual behavior, whereas homosexuals do. Much more protection against homosexuals, therefore, is necessary than the average normal human being. Homosexuals have successfully breached virtuallly every area of adult society. Does anyone think our young people will be immune?

The Civil Service as a special case

The recently issued Executive Order 28 (in New York State) is being watched with disquiet even though the number of known homosexuals on the State payroll is not very large. Will homosexuals begin to drift to State employ? Will they remain circumspect in their actions pending passage of statewide legislation? It is too soon to tell although the possibilities are harrowing...

As a result of this Executive Order, homosexuals are protected on the job. They can identify themselves as homosexual; more, the authority inherent in their position will inevitably transfer to an acceptance of homosexuality as normal and acceptable. They will be free, in the normal course of conversation, to extoll the virtues of homosexuality; they will be able to organize the employee groups to advocate their "way of life". Far from protecting a "private way of life," we will have permitted homosexuals to proselytize openly, and with impunity.

The State intrudes on the personal lives of all its citizens. One cannot, for example, refuse to educate his/her children in a manner the State specifies. Inspectors, state health officials, and the police can enter a home under certain circumstances even over a parent's most strenuous objections. Children, the needy, the ill, and small businessmen are but a few of the categories who must sometimes rely on the good will of state employees for their well being.

Since all State employees can indicate and advocate their affectations while on the job to children (and some adults) who are easily influenced, the state becomes an "instrument of coercion of belief or thought" in the worst way imaginable.

This bears repeating. Individuals, through the authority of the state, have access to a home; children can be exposed to people who, in a myriad of ways, would be free to try to convince them of the benefits of a homosexual way of life.

The State may become the vehicle through which defenseless citizens are exposed to avowed homosexuals whose ideas and views they do not want to hear. In so doing, we will have deprived the people of some of their precious freedom and rights!

V. SOCIETY HAS AN OBLIGATION TO ACT AFFIRMATIVELY TO PROTECT ITSELF

This perhaps is the most difficult concept to project to fair minded individuals. Yet, it is not enough to fend off "gay rights" bills; society must recognize its obligation to actively oppose those who would change it in an unacceptable and unpredictable manner.

Long cherished as an inherent characteristic of our democracy is the right of parents to raise children as they choose. Any action which forces children to be exposed to beliefs or ideals which are destructive of the values instilled by parents, deprives parents of their rights.

Society has a right and an obligation to limit the ability of deviant groups to proselytize. Just as society quarantines the bearers of certain diseases, thereby restricting their freedom, society must prevent the spread of this anti-social pattern to protect itself.

Society must not only limit forces which would destroy its structure; it is perfectly proper for society to promote a life style which it deems necessary to its preservation. Thus, society can advocate the benefits of child bearing and rearing within the family structure. This advocacy in no way threatens those who choose to have children out of wedlock. But clearly, society would not allow advocates of the latter to project their views to children in a classroom.

Society cannot condone certain practices

There is an intellectual climate developing which makes it difficult for society to interfere with the private behavior of its citizens. The recent legalization of consentual sodomy is one indication of the direction in which we are moving; it would not be surprising to hear voices defending the rights of individuals to practice incest, bestiality and necrophily - behind the bedroom walls. "Keep the government out of the bedroom" is the cry, and only the short sighted will doubt that at least some of these practices will be ignored by the law (if not legalized).

But society cannot, ever, consent to any of these "private" actions, should they come to its attention. We can, without too much difficulty, envision the law being changed so that private incest is no longer forbidden (a change which would parallel the legalization of consentual sodomy).

Would we then feel that government should ignore groups advocating incest? Would we permit individuals who practice and advocate incest to have jobs which bring them into contact with young adult children?

The analogy between homosexuality and incest is strong and meaningful and should be kept in mind when addressing the question of special recognition and expansion of privileges of homosexuals.

The **Chairman**. Our next panel will be made up of two distinguished persons, Mr. John Clay and Mr. John C. Roberts. Mr. Clay is representing Lawyers for the Judiciary, a Chicago-based organization with 700 members; and John Clay is a partner in the Chicago firm of Meyer, Brown & Platt. Mr. John Roberts is a professor of law and dean of the DePaul University College of Law, and with them, but not giving an opening statement, is John Boley, who I understand is the principal author of a report that their group has issued on Judge Bork.

Gentlemen, would you stand to be sworn?

[Panel members stand.]

Do you swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

[Each panel members says "I do".]

Gentlemen, I would truly appreciate it if you could stay within your 5 minutes. As we wind down today, I'm going to hold everyone, including Senators, to precisely 5 minutes.

Thank you.

TESTIMONY OF A PANEL CONSISTING OF JOHN CLAY, JOHN BOLEY, AND JOHN C. ROBERTS

Mr. Clay. Thank you, Mr. Chairman. I appreciate the opportunity to appear before this committee as president of Lawyers for the Judiciary, a group of over 700 Illinois lawyers. We have submitted to the committee a basic statement of our position in opposition to the appointment of Judge Robert Bork. We've also submitted a longer supplemental statement which seeks to place our basic statement in an historical and philosophic context. John Boley, on my left, one of the leaders of our group, has been the principal drafter of this supplemental statement, and is here available for questions.

We have also submitted a statement analyzing Judge Bork's judicial philosophy, prepared by another one of the leaders of our group, Dean John C. Roberts, whom I will introduce in a few minutes.

We hope that these statements will contribute to an understanding of Judge Bork's judicial philosophy and also of the reasons why so many people, including the members of our group, are opposed to the appointment of Judge Bork.

We are an ad hoc group, formed a week after the nomination of Judge Bork. Our membership has increased to more than 700 Illinois lawyers in a period of less than 3 months.

We believe that the rapid growth of our group demonstrates the depth of the concern of lawyers about Judge Bork's nomination. We are a broad cross-section of Illinois lawyers, including members of large and small firms and law school professors. The majority of our members are from large corporate establishment law firms. Our members include liberals, moderates, conservatives, Democrats, Republicans, and independents.

I understand that we are the largest ad hoc lawyers group in the country organized to oppose the appointment of Judge Bork.

How was this possible? How did this rapid growth come about? It could not have happened if the people of this country, including lawyers, had not been very disturbed by the thought of Judge Bork sitting on the Supreme Court. Most of our members are not members of or active in any so-called special-interest groups. Many of them are corporate and bank lawyers and estate planners who tend not to get involved in matters such as these. In a way, our group really organized itself. We did not have any paid staff nor a single general mailing to lawyers or bar association groups. When the word got around in July and August that our group was being organized, lawyers would call in asking to join, and send lists of other members from their law firms. And so we grew.

So, to repeat, I think it is very significant that this large group of largely corporate, establishment lawyers should have come into existence to oppose Judge Bork's appointment.

Some of us know Judge Bork; some have been his students, his fellow law school faculty members, his law school classmates, his colleagues on the University of Chicago Law Review. Our members include senior partners at large law firms, some of the largest in the country, and young associates, fresh out of law school.

We are not a special-interest group, and we have no one concern that is paramount. It is the totality of Judge Bork's judicial philosophy, as expressed both in his writing and in his judicial opinions over a period of over 25 years, and the results that this philosophy might produce in the many landmark cases involving constitutional issues which he has criticized in the harshest terms, which disturbs us.

Some of our concerns have been expressed and debated before your committee for many days now. They include the individual's basic rights and freedoms, such as freedom of speech, equal opportunity, the right of privacy. Judge Bork seems to think that these rights of the individual lack compelling force, and therefore that they are subordinate to power, whether that power is governmental or merely the power of the majority.

We feel strongly that, as political scientist Stephen Macedo has put it, Bork sees individual rights as islands in a sea of government powers, instead of seeing government powers as islands in a sea of individual rights.

The CHAIRMAN. Please summarize, Mr. Clay.

Mr. CLAY. We think Judge Bork has it just backwards. We also are concerned that strict adherence to Judge Bork's theory of constitutional interpretation could lead to enormous public dissension, if the Court reverses itself on certain major issues.

Thank you.

The CHAIRMAN. Thank you very much. Mr. Roberts?

Mr. ROBERTS. Senator Biden, thank you very much. As a former student of Judge Bork's and a former colleague of his during my tenure at Yale Law School, I have come very reluctantly to oppose his nomination. Despite his broad professional experience, I believe that Judge Bork's views on legal issues make him a poor choice for membership on the Supreme Court. And, after a careful study of his writings and his speeches, I feel that his views on the role of the Constitution in the protection of civil liberties, and on the process of constitutional reasoning itself, are so out of touch with the main lines of American legal thought and with the deeply held convictions of the American people, that the Senate ought to withhold its consent.

A careful reading of Judge Bork's articles and speeches reveals several major philosophical positions, which have been discussed by a number of witnesses. First, Judge Bork does not seem to believe that there is any general moral basis for law, a position he discussed with you. Secondly, he does not seem to believe that there is a general philosophy underlying the Bill of Rights itself, aside from the particular narrow guarantees written into it. And, thirdly, he believes there is only one way to find meaning in a constitutional provision, and that is by determining what the framers intended that provision to cover.

Now much has been said about original intent and I will not focus on it. I want to focus on the assertion that there is no particular philosophy of rights inherent in the Constitution. This is a startling view because we know a good deal about what the framers thought and said when they were putting the Constitution together and ratifying it. There has been much recent historical work on the intellectual origins of the Constitution, and, in my opinion, it is ludicrous to argue that Madison and his colleagues had no general philosophy upon which the Bill of Rights was constructed.

They wanted to create a limited government that preserved a whole range of powers to the people, and they carefully balanced the powers of our government in order to protect the individual from tyranny, both from majorities and from the executive branch.

What is extraordinary about Judge Bork's views is that they have led him in a series of polemical speeches and articles over a long period of time to condemn virtually every major line of Supreme Court decision-making in the civil liberties area. And I won't go into that list; you have gone through it many times.

Some might argue that placing too much emphasis on these individual cases is improper and that we should look more to Judge Bork's testimony before the committee and to his judicial opinions. As an academic, I do not accept the view that the mature writings of a faculty member should be cast aside as attempts to be provocative and unduly theoretical. We give faculty members support and we give them tenure so that they can write the truth as they see it, and this is what they do.

By the same token, judicial opinions are part of an institutional process with its own internal dynamic—the obligation to adhere to settled precedent and the need to forge a consensus among fellow judges. Therefore, I believe that Judge Bork's true views are found in his speeches and writings, and they are remarkably consistent over the years on the major points of his philosophy.

Some commentators have argued that Judge Bork's views as expressed before the committee show that he is a moderate and that he has accepted many of the ideas that his critics have charged him with arguing against. I think a careful reading of this testimony shows otherwise.

As to some important elements, such as his rejection of the constitutional protection for obscenity, he remained adamant in his testimony. As to certain others, such as the protection of dissenting speech, his responses are confused and contradictory, in my view. He seemed to soften his criticism of the *Griswold* case and the privacy doctrine that underlies it by saying that some other theory might support the case. But I think that a careful reading of his articles and speeches over many years reveals that he has constantly criticized the *Griswold* opinion without ever suggesting any alternative theory that he might accept. Normally, when an academic or a judge criticizes an opinion or a particular doctrine and wants to make the narrow criticism that the particular reasoning is incorrect but the result is correct, they try to supply an alternative theory that will be more acceptable. Judge Bork has not done this in any of these cases.

The main lines of his philosophy still emerge from his testimony, in my opinion. He does not seem to believe in the crucial role of the Supreme Court in protecting the minority from majority legislative will except in the narrowest of cases specified in the Constitution.

Now, it is possible that Judge Bork is right and that Madison and Hamilton were wrong on the matter of the philosophical basis of the Bill of Rights. It is possible that Judge Bork is right and that every judge with whom he pointedly disagrees is wrong—Holmes, Brandeis, Learned Hand, Douglas, Brennan, Powell, and all the rest. It is even possible that Judge Bork is right and all the other legal philosophers who have struggled to give meaning to our constitutional tradition are wrong—Rawls, Dworkin, Ely and the rest. It is possible that he is right and everyone else is wrong, but, in my view, it is not very likely.

We can be tolerant of idiosyncratic legal views on our law faculties and on our lower federal courts, but their influence is greatly magnified on the Supreme Court. Justices should not be too far out of touch with the normal range of expert legal opinion or, in fact, with the feelings and the commitment to liberty of the American people. Judged by this test of fitness to serve on the Court, Robert Bork, talented as he is, clearly fails.

Thank you, Mr. Chairman.

[Statement follows:]

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STATEMENT OF
LAWYERS FOR THE JUDICIARY

September 15, 1987

Lawyers for the Judiciary was organized in early July by Illinois lawyers opposed to the appointment of Judge Robert H. Bork to the United States Supreme Court. The Committee is expanding very rapidly and now numbers over 700 lawyers, representing a broad cross-section of the Illinois legal community, including large corporate law firms, small firms, individual practitioners, lawyers working for governmental agencies, public interest lawyers, and law school professors.

Our members support the basic economic and political values of America and include liberals, conservatives and moderates.

Our Committee feels strongly that the appointment of Judge Bork is not in the best interest of the country.

Judge Bork's judicial philosophy, as stated in his many opinions as a Judge of the Federal Court of Appeals for the District of Columbia and in numerous articles and speeches over a period of more than twenty years, puts him outside the mainstream of constitutional jurisprudence and would deny what our citizens regard as their basic, fundamental rights.

Judge Bork is, in fact, a judicial radical and not in the tradition of leading conservative Supreme Court Justices such as Felix Frankfurter, Robert Jackson and John Marshall Harlan. It is disturbing that the White House, in a briefing book distributed to members of the Senate, is trying to portray Judge Bork as a moderate and is distorting his extreme conservative views.

There is no serious question that the Senate has not only the right but also the duty to inquire into the ideology and judicial philosophy of any nominee proposed for the Supreme Court. This has been true since President Washington's nomination of John Rutledge was defeated by the Senate in 1795 because Rutledge had angered members of the Senate by opposing the Jay Treaty with England. More recently, in 1968, Republican Senator Strom Thurmond, now the ranking minority member of the Senate Judiciary Committee, led a filibuster in opposition to President Johnson's nomination of Justice Abe Fortas for Chief Justice, stating as follows:

> "To contend that we must merely satisfy ourselves that Justice Fortas is a good lawyer and a man of good character is to hold a very narrow view of the role of the Senate, a view which neither the Constitution itself nor history and precedent have prescribed.
>
> It is my opinion, further, that if the Senate will turn down this nomination, we will thus indicate to the President and future Presidents that we recognize our responsibility as Senators. After all, this is a dual responsibility. The President merely picks or selects or chooses the individual for a position of this kind, and the Senate has the responsibility of probing into and determining whether or not he is a properly qualified person to fill the particular position under consideration at the time."

In its biography of Justice Fortas, Encyclopedia Britannica' Britannica Book of the Year, 1969 stated: "Republicans saw [th filibuster] as a maneuver to deprive the next president--wh might well be a Republican--of the chance to appoint the chie justice." The result of the opposition to the Fortas nominati was, the yearbook noted, that for the "first time since 1795" nominee for the Chief Justice position failed to receive Senat approval. (It is one thing to oppose a person's initi appointment to the Supreme Court; it was virtually unprecedent to reject the elevation to Chief Justice of a person who alrea was on the Court.) The yearbook also stated, in its review significant legal developments, that "most U.S. legal schol concluded that political factors, rather than the quality Justice Fortas' work on the court, caused the defeat of nomination."

In choosing Justices of the Supreme Court the President the Senate are equal partners and just as the President prop can take (and, with respect to Judge Bork, clearly has ta ideology and judicial philosophy into account in nominati person for the Supreme Court, so may the Senate consider ideo and judicial philosophy in giving or withholding its consent.

While we agree that Supreme Court Justices should exercise "judicial restraint" and be guided by the "original intent" of the framers of the Constitution, we disagree with Judge Bork's application of those concepts. As applied by him, "judicial restraint" and "original intent" deny the vision of the framers that the Constitution embodies dynamic concepts such as "due process" and "equal protection" which would need to be interpreted in the light of constantly changing social conditions.

What is missing in Judge Bork's view of the Constitution is a recognition of the great spirit of liberty which animated that historic charter and underlies the specific constitutional guarantees. The framers felt strongly that there were areas of individual liberty that must be protected from the majority: freedom of speech and of the press, freedom of religion, separation of church and state, freedom from unreasonable searches and seizures, due process of law, equal protection of the laws. Judge Bork's opinions and articles have exalted majority rule and the power of the executive branch over the rights of minorities and individual rights.

The Bill of Rights embodied in the first ten amendments to the Constitution was designed to protect the individual and minorities from the will of the majority. Our democratic government is majoritarian but with the constitutional guarantees of the Bill of Rights carved out as areas where the interests of the individual are so important that the majority will must yield. Judge Bork states that the constitutional guarantees must be interpreted narrowly to avoid the evil of the Court legislating its own prejudices.

We obviously agree that the Court should not decide cases based on its own prejudices, but we reject Judge Bork's narrow, cramped view of the great constitutional protections. In fact, his theory of constitutional interpretation (by Judge Bork's own admission) has been rejected by the overwhelming majority of constitutional law scholars. It has also been rejected by the Supreme Court Justices who decided the many landmark cases hereinafter mentioned. These Supreme Court Justices based their opinions on what they considered the meaning of the great constitutional concepts, including the intent of the framers, as applied to the facts of the particular cases.

Judge Bork has been criticized by his fellow appellate court judges as not exercising judicial restraint himself. See Dronenberg v. Zech, 746 F.2d 1579 (1984) and Ollman v. Evans, 750 F.2d 970 (1984). But the application of the guiding principles is not an automatic process. The Constitution does not define these broad concepts which must be constantly applied to new situations in the light of the great underlying principles of individual rights, liberty, a government of checks and balances and an executive branch with limited powers, reflecting the beliefs of the Founding Fathers that they had had enough of Kings and arbitrary executive power. We are concerned by Judge Bork's action in dismissing Archibald Cox as Special Watergate Prosecutor (subsequently held by the Federal District Court to be an unlawful action). We are equally or more concerned by his opinion that the appointment of special independent federal prosecutors is unconstitutional, and by his record as a Judge in ruling in favor of the government in the vast majority of cases involving individuals and questions of access to the courts.

We are disturbed by the injudicious nature of Judge Bork's vehemently expressed statements that many of the landmark Supreme Court cases involving constitutional protections have been "unconstitutional", "utterly specious", "illegitimate" and "pernicious."

Judge Bork has said that the Constitution does not include a right-of-privacy and has criticized in the strongest terms the whole line of right-of-privacy cases, including Griswold v. Connecticut, 381 U.S. 479 (1965) declaring unconstitutional a Connecticut law making it a crime for anyone, including married couples, to use contraceptives, and Roe v. Wade, 410 U.S. 113 (1973) striking down a state abortion statute. Judge Bork has also strongly criticized Skinner v. Oklahoma, 316 U.S. 535 (1942), striking down an Oklahoma statute requiring sterilization of "habitual criminals", Shelley v. Kraemer, 334 U.S. 1 (1948) declaring unconstitutional racially restrictive covenants, Harper v. Virginia State Board of Education, 338 U.S. 663 (1966) striking down a state poll tax, University of California Board of Regents v. Bakke, 438 U.S. 265 (1978) upholding the constitutionality of affirmative action, and Dennis v. United States, 341 U.S. 494 (1951). Further, he critically attacks cases involving the position taken by Justices Holmes and Brandeis that speech which advocates the overthrow of the government, or any violation of law, may be forbidden only if a "clear and present danger" or "imminent and likely harm" is established. Judge Bork has said that only "explicitly political" speech is protected by the First Amendment. He has since recanted, but how much is uncertain, and has said that "moral and scientific debate" deserve protection, but not "obscenity and pornography." It is far from clear whether, or to what extent, literary and artistic works would be protected.

Judge Bork has also criticized the legislative reapportionment and one-man, one-vote cases, Baker v. Carr, 369 U.S. 186 (1962) and subsequent cases, and Engel v. Vitale, 370 U.S. 421 (1962) striking down a state law allowing public schools to have state-sponsored prayer read in class.

Our Committee is struck by the breadth of Judge Bork's condemnation. It encompasses many of the most important constitutional decisions of the last thirty-five years. It is doubtful that Judge Bork's strongly held views would be tempered by a respect for precedent. He has stated that if a prior Supreme Court decision is "wrong" and "pernicious", it should be overruled. His list of cases and settled Supreme Court doctrines that might be considered in his view to be "wrong" and "pernicious" is so long that, if his views were to prevail, the clock of constitutional protections would be turned back for several decades. The Senate's previous approval of Judge Bork for the Court of Appeals should not give pause to oppose his appointment to the Supreme Court. The offices are very different. As a Judge of the Court of Appeals he was compelled to abide by Supreme Court opinions and has been subject to reversal. But as a Justice of the Supreme Court he would not be so constrained. He would be guided by his own concept of constitutional interpretation and by a rather vague deference to stare decisis.

Judge Bork has also stated rather ominously that one of the ways to cure erroneous constitutional decisions is through the process of appointing Supreme Court Justices. It is difficult to exaggerate the confusion and dissension which would result from an overruling of the landmark cases criticized by Judge Bork.

Since Judge Bork could be on the Supreme Court until well into the 21st Century and his radical judicial philosophy could affect our lives in so many vital areas, we urge the members of the United States Senate to vote against the appointment of Judge Bork.

[This Statement has been prepared and is released by Lawyers for the Judiciary as a reflective essay that seeks to put the proposed appointment of Judge Robert H. Bork to the United States Supreme Court in a meaningful historical and philosophical context. While the Statement has been reviewed by a number of members, it is obviously not possible to have all members review a statement of this length, and of this scope--which extends beyond the issue of the nomination of Judge Bork. Some members may not share all of the views expressed. The Steering Committee believes, however, that the basic philosophy reflected in the Statement is shared by a large majority of our members.]

Statement of Concerns for Moderates, Liberals, and Conservatives

LAWYERS FOR THE JUDICIARY
Room 3733
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Chicago, Illinois 60603

September 23, 1987

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Concerns for Moderates, Liberals, and Conservatives

-- Our Bias --

Like most Americans, the lawyers in our group have a stake in our government's decisions. Like most Americans, we are biased. A few of us are law school professors, or are in corporations, public-interest firms, or small law firms. Most of us are in large firms, whose primary clients are corporations or financial institutions.

Our financial and personal stake in American business, and in America, is to us a substantial one. Our stake is our bias.

We do not speak for our firms or law schools, and some of our colleagues disagree with our conclusions on Judge Bork.

Our firms comprise Republicans and Democrats. Moderates, liberals, and conservatives. Catholics, Jews, Protestants, and others. Both men and women. But such labels and factors are extraneous to our work; we ignore them when we judge each other.

If there is an entrance exam for our group, it is passed by any lawyer who supports the basic economic and political values of America. Any lawyer who falls within the traditional mainstream of America's conservative-moderate-liberal spectrum.

Our views will not attract extremists, who are beyond the borders of such spectrum. Lawyers and courts exist for the peaceful avoidance or resolution of disputes. Much of our legal system is useless, and America dangerously at risk, when people resort to the extremists' tools: venom, bullets, and bombs. Those tools were used by left-wing radicals in the late 1960's, and are used by right-wing radicals today.

We are witnessing distortion of words, and of principles, both by extremists and, in some cases, by other proponents and opponents of Judge Bork.

Even apart from personal preferences, the members of our group are normally forced to not mislead or misstate--there is usually an able, well-informed lawyer on the other side of the table, to keep us honest. In this Statement we will try to give words like "conservative" and "liberal" their traditional meanings, not the warped meanings given to them by extremists. A conservative is not a "narrow-minded bigot" or "redneck" or "Fascist reactionary". A liberal is not a "bleeding heart" or "egghead" or "Communist radical".

Alexander Hamilton, Senators Robert Taft and Everett Dirksen, and Justice Felix Frankfurter (appointed by Franklin Roosevelt, a liberal Democratic President) were conservatives. James Madison (the chief drafter of the Constitution), Senators Hubert Humphrey and Adlai Stevenson (and his father), and Justice William Brennan (appointed by Dwight Eisenhower, a moderate Republican President) are fairly called liberals.

The labels are, of course, only customary uniforms. On a few important issues, James Madison was a conservative and, on others, Hamilton a liberal. And Justice Lewis Powell, whom Judge Bork would replace, was conservative on most issues, but moderate on at least two of the major issues in President Reagan's social agenda.

Labels also may overlap. As King George III and his "loyalist" Americans knew well in 1776: conservatives Washington and Hamilton, and liberals Madison and Monroe--and most other Americans--were law-breaking criminals: not just radicals, but traitors and revolutionaries. But our "non-Loyalist" ancestors were willing to take the consequences: the Revolutionary War.

So we suggest that people be skeptical of words, including ours. Statements, perhaps especially those of lawyers, should be tested both by whether they make sense and--a most unlawyerly thought--by whether they "feel" right.

Our group has not been polled on social agendas, or other passions of the day. Decisions on currently explosive issues like abortion and school prayer will affect millions of Americans, but we doubt that many immigrants have been drawn to America by its laws for or against abortion or school prayer. Although we urge restraint by both sides on these issues, our concerns are broader and deeper.

America rests firmly on the bedrock of an economic and political heritage that has, as its core, the individual's rights, aspirations, and achievements. The lawyers in our group are grateful beneficiaries of this heritage. Just as it rewards and protects us, so should we protect it, for ourselves and for others.

-- America's Economic and Political Heritage --

Americans have enjoyed, and not yet lost, a cornucopia of economic, political, and civil rights--and the fruit of those rights. For centuries these benefits have drawn immigrants here, to a country at the end of the rainbow.

We have come from all continents. We differ in our appearance, our speech, our religions, our customs. We often dislike these differences. Too often, "we" scorn "them", or "they" scorn "us". Our prejudices erupt, on occasion, into violence.

But we have been lucky. In our Revolution, our violence as lawbreakers was directed against an English king, not against each other. In our Civil War, which we seem still to be fighting, we were ravaged by violence; nonetheless, that war was essentially between agricultural southern states and industrial northern states, and between southern states and the federal government, not between "haves" and "have-nots".

Except for our Civil War, we have been spared the scourge of further revolution. In 1787, Thomas Jefferson (the principal draftsman of the Declaration of Independence, and a major force behind the Constitution) remarked: "What country before ever existed a century and a half without a rebellion?" Now, except for the Civil War, we can say "three and a half centuries". He said in the same year that "a little rebellion, now and then, is a good thing". We Americans took his advice: we have had a series of little rebellions.*/ But our (at least eventual) intelligent responses to them have kept our rebellions little.

Unlike repressive nations, the United States has rarely faced collective, widespread violence. Most Americans have had more to lose, than to gain, from such violence.

We have been smart, not just lucky. For our economic system we chose capitalism and free enterprise--a system motivated and driven by the efforts of free individuals. "American ingenuity" has always commanded respect, here and abroad. "Progress" has always been an American goal and, economically at least, always an American achievement.

Our economic heritage has given us prosperity, sooner to some and later to others. To those who have not yet prospered, our heritage still offers opportunity, and thus hope. Most of us do not want to lose what we have, or what we at least hope to get.

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*/ Often on labor-management disputes, like the 1886 Haymarket Square Riot, seeking an eight-hour day; or the 1894 Pullman strike over wage cuts--a strike suppressed by President Cleveland's use of U.S. troops despite objections by Illinois Governor Altgeld.

We have also been smart in choosing a political system that exalts the individual, and that protects the individual's freedom--from interference by minorities, majorities, and government. The most passionate belief of our political heritage may be that we revere liberty, and the rights of individuals. It is "Liberty", not "Order", that we engrave on our coins. This liberty, and these rights, also have come sooner to some and later to others.

Political and social progress has rarely been an American goal. In this area we have not cheered for the underdog, but have usually tolerated him--and sometimes have even conceded that he should, partly in our own long-term interest, have the same rights and opportunities as the rest of us. Thanks to our basic belief in fairness, we generally have ended up following an American tradition: "doing the right thing". We may not like it; but at some point we usually rise above our prejudices and we do it.

In practice as well as theory, the line between our economic rights and our political and civil rights is blurred. Would our political and civil rights survive, in the absence of economic prosperity? Would we have our economic prosperity, if we lacked our political and civil rights? Perhaps.

Our liberty and rights are always under siege. The assaults arise in large part from tensions among us and from excessive governmental regulation and interference--by all levels of government from federal to local, and by all branches of government: the legislative, the executive and, more rarely, the judicial.

Some Americans--perhaps most, on one issue or another--think we need more governmental regulation. That is usually when we hear not about "interference", but about "support" or "freedom" or "rights". Whatever it is called, it is still interference.

-- Keeping Perspective, Usually --

Since we elect the President and Congress, we Americans may take part of the credit for their interference we like, and must take part of the blame for interference we dislike. It is the President and Congress, working together, who tax us, regulate us, and spend our money--and who on any one issue go "too far" or "not far enough", and "too soon" or "not soon enough". They, not Supreme Court Justices, provide most of the federal interference in our lives.

People often worry more about Presidential than Congressional elections. This occurs during each presidential campaign. Harry Truman, a haberdasher, and Dwight Eisenhower, a general, had "too narrow a background" to be good Presidents. John Kennedy, a Catholic, would "listen to the Pope, not the people", and Ronald Reagan, an actor, would "just read his writers' lines". Harsh words, but sincere concerns.

Some in our lawyer's group are grandfathers. Like many grandfathers, we give advice when nobody asked for it. When we heard those concerns from friends, we often said something like this: "Don't worry so much. On any one issue, each President has gone too far, or not far enough. But this country survives its Presidents. In many other countries, one person or small group has all three powers: to make the laws, to enforce them, and to interpret them--and the people are silent, and had better be silent. Not here. We have a unique Constitution that separates those powers and gives them to Congress, the President, and the Supreme Court. A Constitution that limits the powers of each branch of government. A Constitution by and for "We the People", that affirms the natural rights of the people--then adds the right to vote. And, perhaps most important, a Constitution that requires the government to act in accordance with law, not with personal views--whether those views are deeply-held beliefs or arbitrary whim. A President can't get too far out of line, because he'll get his hands rapped by Congress, or the courts, or the people. Trust the System. It's imperfect. It's frustrating. But it works." We probably bored our friends. But we think we were mostly right.

The haberdasher, the general, and the actor won. Later, they won again. And the Catholic served long enough to convince us that his outlook was broad enough, and his respect for our System deep enough, that he would not impose his religion's beliefs on the rest of us. We thank all of these men.

Since the Supreme Court's power is, by tradition, primarily to interpret laws, the Court normally has only a modest effect on our lives--although occasional decisions, over two centuries, have been significant indeed. Americans seldom worry about Court nominations, or whether a vote for a President or Senator includes a mandate on judicial appointments. The present furor over "mandates" and Judge Bork is an exception.

Judge Robert Bork has an impressive educational and professional background, is very bright, and is a formidably gifted writer and speaker. We thank him for his service as a law professor, as Solicitor General, and as a judge. If he is confirmed our country will, in the long run, survive him.

We try to keep our sense of perspective. We do, however, have concerns about Judge Bork's confirmation, and the dissension and turmoil it may foster for a generation or two--when, as always, America will need stability and unity. Justices tend to survive, by many years, the Presidents who nominated them. Justices' court decisions may survive even longer.

Our group does not object that six of the current eight Justices were appointed by Republican Presidents; the people elect their Presidents as well as their Senators. Nor do most of us object to the present ratio of six conservative and moderately conservative Justices to two liberals, although it may be unwise to lack mere "moderates" or to have too much of an imbalance, to the left or to the right. Nor would most of us--who normally do not get involved, and who are reluctant to get involved now--object to the confirmation of a traditional conservative.

The vehicle of federal government has successfully had drivers who were moderates or liberals or conservatives, but it has needed liberals as its motor, and conservatives as its brakes.

Most Americans probably agree that Supreme Court Justices are essential brakes in our federal government. But Americans should decide whether the Justices should act only as brakes.*/ Regardless of how they answer that question, Americans should also decide whether Judge Bork, or any similar nominee, would be merely a brake.

--Nonsense and Sense--

A disturbing aspect of media coverage of the Bork nomination is that, including in most of the comments quoted below, the media talks only of "Democrats" versus "Republicans", or "liberals" versus "conservatives". Controversy sells newspapers, but such analysis is misleading. Worse, the media seems to have adopted the extremists' lexicon: that there are no moderates, and that traditional conservatives and traditional liberals cannot be on the same side of this issue.

Our comments may become lost among many. An article in Time states that by September 15, when Judge Bork's Senate confirmation hearings began, "hundreds of liberal and conservative groups will have spent more than $20 million to promote their sharply different pictures of Bork." A staggering amount, that will pay for countless thousands of words. (Nobody is paying us; that displeases some of our partners.)

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*/ See the remarks and opinions of Jefferson, Aristotle, and Hamilton, in Appendix A, pages 4-5. Those remarks apply to the executive and legislative branches, as well as the judicial branch.

Sage advice on how to listen to or read those words was given by Jon Margolis, Washington Correspondent for the Chicago Tribune. He lambasted, as "blather" and "nonsense", what we will hear from politicians. He said that the Democrats will say that the President "had no right to nominate Bork, not just because the judge is a conservative but because he might tip the court majority in that very direction", and that the Republicans will add "their own nonsense, which is that the Senate has to confirm Bork because the President nominated him, because he appears to be an upright fellow and because a senator has no right to reject a candidate just because he disagrees with him."

As the column noted, the Constitution does not require any reason for either nomination by the President or rejection by the Senate. (The Constitution states merely that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...Judges of the Supreme Court".)

The nonsense will also arise from partial quotations taken out of context: a recent Newsweek article reported that a Republican Senator quoted from the first half of Hamilton's Federalist No. 76, for the argument that the Senate should not have exclusive power to select Supreme Court Justices; and that a Democratic Senator quoted from the second half, for the argument that the President should not have such exclusive power.

Many will recall the furor and filibuster that occurred during the 1968 controversy over Justice Abe Fortas (an exceptionally bright Justice and, as to skills, a lawyer's lawyer). Not trusting our memories for the details, we consulted Encyclopaedia Britannica's Britannica Book of the Year, 1969. Justice Fortas, a Supreme Court Justice for the preceding three years, was nominated by President Johnson to be Chief Justice. In its biography of Justice Fortas, the yearbook stated: "Republicans saw it as a maneuver to deprive the next president--who might well be a Republican--of the chance to appoint the chief justice. Southerners and other conservatives were angered by recent court liberalism on civil rights and criminal law." "In July the Senate Judiciary Committee subjected Fortas to an unprecedented four-day grilling by hostile members." "The nomination was finally cleared by an 11-6 vote of the committee on September 17, but when the nomination came to the Senate floor its opponents began a filibuster. On October 1, supporters of the nomination failed to close the debate. Shortly afterward Fortas requested that his name be withdrawn, and the president complied."

The result of the opposition to the Fortas nomination was, the yearbook noted, that for the "first time since 1795" a nominee for the Chief Justice position failed to receive Senate approval. (It is one thing to oppose a person's initial appointment to the Supreme Court; it was virtually unprecedented to reject the elevation to Chief Justice of a person who already was on the Court.)

The yearbook also stated, in its review of significant legal developments, that "most U.S. legal scholars concluded that political factors, rather than the quality of Justice Fortas' work on the court, caused the defeat of his nomination."

The public should not, however, throw up its hands and walk away. Often buried in the bickering, there is sense. It is not just politics. And both of Hamilton's arguments, referred to in the Newsweek article, make sense. So do many of Hamilton's other arguments, and those of Madison, Jefferson, and other Founding Fathers.

-- The Constitution's Ancestry --

Our Founding Fathers worked with a clean slate, on a rare task: to establish the ground-rules for a new nation.

In this bicentennial year, Americans can easily see what was written on the slate: copies of the Constitution will even be distributed through certain grocery marts and gas stations. Americans will also be told much about what our Founders said about the Constitution.*/

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*/ We commend The Philadelphia Inquirer for its daily diary of Constitutional proceedings; this has been syndicated through other newspapers. We also commend Prudential and Phillip Morris and other American businesses that have paid, as advertisements, for Charles Mee's "Only in America" Newsweek series of one-page articles on the Constitution. A good introduction to the Supreme Court today, to the Constitution, and to America in the 1780's is in the The Constitution special edition of Life magazine; marvelous photographs, as usual, but also some informative text. For the 1780's and most other periods of history, we recommend the text and photographs in a Time-Life series, Great Ages of Man. A fascinating reference book, for facts, is the paperback The Timetables of History, which charts each year's events in politics, literature, philosophy, the arts, etc. Columbia University's Columbia-Viking one-volume desk encyclopedia is also very useful, for kernels of ideas as well as for facts. And many Americans already own multi-volume encyclopedias like Americana, Britannica, and World Book.

Americans may see little, however, about what the Founding Fathers had read and learned, both from the past and from their contemporary 18th-Century world. This can help us understand the intentions and values of the Constitution's drafters.

These intentions and values have become an issue. In his lucid statement of the controversial concept of "original intention" (a proposed exclusive guide for the Supreme Court in deciding constitutional issues), Judge Bork has said: "It is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know." We agree with his statement, though we may disagree with him about which "values" were deemed by the Founders to be fundamental ones. Further, we seem to disagree on whether we should consider the world that followed the 1780's. We may also disagree on whether the Founders "knew" a world of only the 1780's--or also of earlier periods.

Today we celebrate the past 200 years. Our Founders looked instead to their own 18th Century and the preceding 200 years, and even to earlier periods.

Is it important to know what the Founders knew? It might be, if we want to keep living together: in 1855, six years before he became President and before we lost the first of the 750,000 Americans who died in the Civil War, Abraham Lincoln complained about Americans who abhorred the oppression of Negroes but were "degrading classes of white people":

> As a nation we began by declaring that "all men are created equal." We now practically read it "all men are created equal, except Negroes." When the Know-Nothings get control, it will read "all men are created equal, except Negroes and foreigners and Catholics."

A recent Chicago Sun-Times/Gallup poll asked Chicago-area Catholics whether they feel discriminated against, socially or professionally; 11% said yes, but "an overwhelming 85 percent say no". That is progress.

But nobody wants to be on Lincoln's list of exceptions, or on any similar list 50 or 500 years from now. Americans might be less prone to compose such a list if they knew what the drafters of the Constitution knew.

At Judge Bork's confirmation hearings, Senator Simpson has quoted from Rudyard Kipling, England's first Nobel Prize winner in literature. (We, our children, and our grandchildren have all enjoyed Kipling.) Kipling said "All we have of freedom, all we use or know--This our fathers bought for us, long and long ago." Many Americans forget that it was the English, in particular, who fought most of our battles for freedom--that most of our political and civil rights, and most of our legal principles, were borrowed from the English, who warred for centuries to gain them. That, too, is what our Founding Fathers knew.

Some of that knowledge is described in Appendix A accompanying this Statement. That knowledge pertains to constant wars, and to continuing political and religious intolerance and repression--Authority quelling the Individual's efforts to learn, to speak, and to achieve. It pertains also, and consequently, to the supremacy of arbitrary and capricious Personal Government, over the Rule of Law.

--Our Constitutional Documents--

It is generally accepted that America's Constitutional documents comprise the Declaration of Independence (in 1776), the Articles of Confederation (in 1781), and the Constitution (in 1787, ratified by 1789) and its Amendments.

1987 Preface to 1787

For those who have read this far, we urge that they keep three issues in mind, in reading the remainder of this Statement (and the historical summary in Appendix A): States' Rights, Individuals' Rights, and the Rule of Law. All three issues were critical in the 1770's and 1780's, and are critical today.

States' Rights (versus the rights of both Individuals and the Federal Government) were of fundamental importance in the drafting of the Articles of Confederation, but were given much less emphasis in the Constitution. They remained important, however, until the Civil War supposedly determined, conclusively, that their importance and role would be subordinated.

Americans can determine for themselves the relative historical and current importance of Individuals' Rights.

The Rule of Law, and not the Rule of Men (or Impersonal Government, and not Personal Government) is simply the concept that all branches of state and federal government, and all persons, should obey the law. The Rule of Law is the true meaning of "Law and Order": that governments and persons must act in accordance with Law, not arbitrarily or capriciously; they nonetheless have the right--at least most of the time, in America-- to protest the laws, but such protest must be peaceful, and hence must preserve Order. Laws may be disobeyed, and Order replaced by disorder--as Americans did in the Revolution--but the lawbreakers had best be willing to go to jail (or worse) unless they can win (as we did in the Revolution), and to stay in jail unless they can convince the courts that their lawbreaking was justified. (In the 1960's, blacks protested peacefully against segregation in, for example, lunch counters and busses. These blacks then were both physically beaten and jailed. But their claims against unjust laws were ultimately upheld, and they were released from jail.)

The final aspect of the Rule of Law is that since 1803 America has accepted at least in theory, and usually in practice, that it is the Supreme Court which, on constitutional issues and matters involving interpretation of federal statutes, has the final word on the proper interpretation of such law--that the Supreme Court determines the Supreme Law of the Land.

Bear in mind those three issues, since this Statement will at one place or another discuss the following:

> 1. The implementation or rejection of the Administration's social agenda will be done by state legislatures (by invocation of the theories of the Attorney General's "original intention", or Judge Bork's "interpretivism" or "intentionalism", and Judge Bork's "majoritarianism"). That is the acknowledged goal, and effect, of such theories.
>
> 2. Individuals' Rights will (by invocation of the same theories) be subordinated to the Majority's Rights (as expressed by state legislatures, but see footnote on page 46), except when such subordination would violate specific Individuals' Rights found (pursuant to the narrow "original intention" theory) in the Constitution.
>
> 3. The explicit Constitutional rights of corporations and other businesses are non-existent, and have arisen only from judicial "activism", not judicial "restraint", in the interpretation of the Constitution. Corporations will also be subject to increased regulation by state legislatures (through the same concepts of "original intention" and "majoritarianism"), but (absent judicial "activism") without the

protection of the Constitutional rights applicable to Individuals.

4. The explicit Constitutional rights and powers of the President, and Congress, and the Supreme Court, are both limited and vague, and the present extensive rights and powers of these branches of the Federal Government, like the more limited rights of businesses, have arisen only from judicial "activism", not "restraint", and are subject to extensive reductions (through "original intention" and "majoritarianism").

Only the first two of the above consequences (plus certain reductions in Congressional and Supreme Court powers, under "4") are sought by the present Administration and by Judge Bork. The other consequences would occur if (i) state legislatures and courts begin themselves to implement the above theories, or (ii) the Supreme Court rigorously applies such theories.

Reviewing all of the above consequences, one might ask as to States' Rights: Did we really adopt the Constitution, or is it the Articles of Confederation that are alive and well?

As to the Rule of Law, bear in mind the following:

1. The statement of the Attorney General that each branch of federal government (not only the judiciary) has the "duty", which has been construed by the Justice Department to mean the "right", to interpret laws. (This is discussed later, under "A Major Concern" and "A Likely Concern"). Consider the consequences when this "right" is, as it has been, extended to state government and to individuals.

2. Judge Bork has called the invalidated Connecticut anti-contraceptive law "nutty", but noted that it had been ignored anyway. Judge Bork also has continuously denounced existing Supreme Court decisions as "unconstitutional" and "utterly specious" and "fundamentally wrong", and has accused the Court of "subversive advocacy" and of acting "lawlessly". Until the Senate hearings, he has also questioned, vehemently, the importance of adhering to precedents.

> President Reagan, Attorney General Meese, others in the Executive branch, and Judge Bork have fostered public dissension by themselves denouncing, and by openly encouraging proponents of the social agenda to denounce, existing Congressional statutes and Supreme Court decisions. President Reagan also has elected not to execute all laws, and has selectively declined to enforce provisions of certain laws, such as those relating to civil rights and environmental protection. What have been the consequences of such words and actions, on such matters as respect for "Law" and maintenance of "Order"?

We now proceed to a brief discussion of America's Constitutional documents.

Declaration of Independence

We began well. In 1776 we declared our independence "to which the Laws of Nature and of Nature's God entitle" us, and proclaimed that "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." (Emphasis ours.)

In those words of Thomas Jefferson, there repose important principles, not mere rhetoric. Construing these words strictly, without "interpreting" them, they seem to say:

> 1. It was not man's laws, but the laws of "Nature", and of "Nature's God", that justified our becoming an independent nation. (Carved in stone on the Department of Justice Building are words that should be heeded more often: "JUSTICE IS FOUNDED IN THE RIGHTS BESTOWED BY NATURE UPON MAN. LIBERTY IS MAINTAINED IN SECURITY OF JUSTICE.")
>
> 2. The truths proclaimed in the document were "self-evident", and therefore did not require a carefully reasoned or explicit philosophical foundation.

3. One "truth" is that "all men are created equal".

4. All men are endowed by their Creator with "Rights" that are "unalienable"--that cannot be transferred or surrendered.*/

5. Three God-given Rights are "Life", "Liberty" and "the pursuit of Happiness", but these are only "among" such Rights: This clearly connotes that men have other rights that are "natural" (all factions seem to agree that this adjective is acceptable, to describe rights derived from the "Creator" and from "the Laws of Nature and of Nature's God"). But there is no listing of such other Rights.

6. Man's rights existed first, and it was to secure (to "shield" or "guard") these rights that Governments are instituted among ("by the common or joint action of") Men.

7. The Government so established derives ("receives" or "traces the origin of") its just ("righteous" or "equitable" or "legally right") powers ("ability to act" or "authority") from the consent of the governed.

The above statements seem to be fair descriptions of what the Declaration says. Not what it should say, or should mean, but what it says.

Articles of Confederation

These Articles were enacted in 1781 and remained effective until superseded in 1789, when the 1787 Constitution became effective. Some of their provisions will be discussed below, under "The Constitution", for the significance they lend to the provisions of the Constitution.

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*/ The 1959 unabridged Second Edition of Webster's New International Dictionary defines "unalienable" as "inalienable"; and "inalienable" as "Incapable of being alienated, surrendered, or transferred." The dictionary compares "inalienable" with "indefeasible": the latter term refers to an "absolute" interest, such as title to a house, which interest may, however, be transferred; but "under the Constitution of the United States, personal liberty, freedom of speech, etc., are inalienable rights." (Emphasis ours.)

Many Americans know that the Articles failed because they gave inadequate power to the federal government: that if Congress needed funds, it had to request them from the states, which in turn would tax their citizens; and that if the President wanted to execute the laws, he could look only to the states to implement such execution (including, where necessary, to provide troops--the Revolutionary War had not yet ended).

This problem was real, even in minor matters: John Adams, negotiating a commercial treaty while in London (see App. A, p.1), admitted he lacked authority to bind America, and received an English request that representatives attend from all 13 American states. And on major matters arising from the Government's powerlessness: Nathaniel Gorham, the president (of a "Committee of the States", not of "the United States"), supposedly conducted secret negotiations with Prussia's Prince Henry, as to Henry's possible role as America's monarch.

The Congress (of Confederation) did, however, obtain agreement from the states on one significant matter: the Ordinance of 1787, another of Jefferson's creations. Certain of the thirteen original states had made competing claims to the Great Lakes area west of Pennsylvania. In a remarkable concession, which perhaps avoided armed conflict between those states, the states (primarily Virginia) ceded such Northwest Territory to the United States, and made provision for the admission of new states, in which (as urged by Jefferson) slavery would be prohibited. This Ordinance thus gave rise to the States of Ohio, Michigan, Indiana, Illinois, Wisconsin, and (part of) Minnesota.

The Constitution

As many know, the Constitution was drafted in 1787, and became effective in 1789. We will focus primarily on aspects that may not be widely known.

Most readers of the Constitution know that it focused upon basic governmental structure, and stresses two concepts borrowed partly from England's John Locke and, especially, from Montesquieu's 1748 The Spirit of the Laws: the separation of powers among the three branches, and the system of checks and balances. Both concepts were designed to avoid or at least minify excesses by any one branch.

Separation-of-powers is a concept understood by most.

Checks-and-balances is understood less: it means that one branch of government either shares a power with another branch (or within the same branch--that is the reason for a House of Representatives and a Senate), or has some of the other branch's power. An example of a shared power is in the nomination (by the executive) and confirmation or rejection (by the legislative Senate) of Supreme Court and other federal court judges. An example of an overlapping power is that the legislative branch has the primary power to make laws, but the executive may veto them--which veto may in turn be overridden by the legislature. (Let us not get embroiled in an argument over whether the Senate's confirmation-power is a shared or overlapping one. In one or the other capacity, the power exists. See "Nonsense and Sense", above.)

A novel and surprising aspect of the Constitution is the extent to which it leap-frogs the states, by establishing a number of direct connections between the federal government and the people. The Articles of Confederation established a government that derived its powers from the states, and the Articles' preamble refers to "a confederation and perpetual union between the states"; the Constitution establishes a government with powers derived directly from the people, and the Constitution's preamble provides that "We the People of the United States...do ordain and establish this Constitution for the United States of America." (A Lee from the Virginia family contended bitterly that it should read "We the states".) The Articles reserved powers only to the states, but the Tenth Amendment to the Constitution (part of the "Bill of Rights" ratified in 1791) states that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (Emphasis ours.)

The Articles provided that members of Congress would be appointed annually by state legislatures, and could at any time be recalled and replaced; the Constitution provides for the election of Representatives every two years by the people, and of Senators every six years by the legislatures (but now by the people, pursuant to the Seventeenth Amendment). The Articles provided that each state (legislature) had one vote in electing members of Congress; the Constitution provides that each state shall have two votes in the Senate, but that states' votes in the House shall be proportional to their populations.

The Constitution thus implements the Declaration of Independence's principle that it is the people, not the states, who are the ultimate sovereigns, from whom the Government derives its limited sovereignty--and that it is the people who retained for themselves both specified and unspecified rights. How then can states (which clearly are not the source of the Government's sovereignty or the peoples' natural and federal rights) interfere with or rescind that sovereignty of the Government or those rights of the people?

Probably the most original aspect of the Constitution is, in addition to the separation of powers, the establishment of an independent judiciary. This appears to be unique, in the history of written and unwritten constitutions. Montesquieu (expanding upon John Locke) is drawn upon by Madison in The Federalist,*/ No. 47: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty...." "Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression." (Emphasis ours.)

The contrast between the Constitution and the English constitutional system, our closest parent-system, is what makes our separate judiciary, and our separation of powers generally, so remarkable. Both our system and theirs exalt the Rule of Law, but the English largely ignore separation of powers. The English blend the executive, legislative, judicial, and religious. (See App. A, p.12)

Most astonishing to Americans is England's lack of separation of Church and State: (i) the Archbishops of Canterbury and York and more than 20 senior bishops are "Spiritual Peers" who are members of Parliament, (ii) since 1534, the King or Queen is the only supreme head of the Church of England, and appoints its bishops, and (iii) since 1539, it is the Government, through Parliament, that has had the power to alter the doctrines, and articles of belief, of the Church of England.

Suffice it to say that the framers of our Constitution were acting deliberately indeed, when they adopted the principles of separation of power, and separation of Church and State. And even in 1787, America probably could not have agreed upon one "Church", from among our Christian faiths.

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*/ The Federalist Papers were written by Hamilton (about two-thirds), Madison and, the eldest and most prestigious, John Jay. They were serialized in newspapers from 1787 to 1789, and helped cause the Constitution to be ratified.

Our Founding Fathers were fortified by their religious faith, as evidenced in the Declaration of Independence, their writings and speeches and, in many or most cases, their belief that the natural law--which gave rise to natural rights that pre-dated government--consisted, in the words of the Declaration of Independence, of the "Laws of Nature and of Nature's God". (These may be two sets of Laws, or only one, but it is manifest that at least *some* of these Laws arise from Nature's "God".)

But the Constitution itself adopts neither a monarch nor a religion. Except for the requirement of nine states for ratification, the final substantive words (in Article VI) of the Constitution are that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." And the required Presidential Oath "or Affirmation" in Article II specifies that the President shall solemnly swear "(or affirm)" to perform the specified duties. Further, we offer a statement in an official federal document, The Tripoli Treaty of 1796: "The government of the United States is not in any sense founded on the Christian religion." Freedom of religion is among the rights secured by the Bill of Rights, the first Ten Amendments which were ratified in 1781. Their major draftsman was the Constitution's major draftsman, James Madison.

In the 1787 Constitutional Convention, George Mason of Virginia was among those who demanded that our rights and freedoms be recognized in the Constitution itself. (He had been a principal force behind Virginia's Declaration of Rights, upon which--together with, more indirectly, the English Bill of Rights--the federal Bill of Rights was largely based). But a majority of delegates opposed such inclusion, since to enumerate *specified* rights might imply that no *other* rights existed. In effect, Mason's argument was adopted, and various states refused to ratify the Constitution unless the Bill of Rights was added; this is reflected in the preamble to the Bill of Rights, which notes that State legislatures, while considering ratification of the Constitution, "expressed a desire, *in order to prevent misconstruction or abuse of its [the Constitution's] powers, that further declaratory and restrictive clauses should be added*...."(Emphasis ours.)

These Rights are largely procedural rights, of individuals, and take the form of restrictions upon our Government: for example, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof", and that "No person" shall "be deprived of life, liberty, or property, without due process of law".

The Bill of Rights did not *grant* us our underlying, substantive rights. Consistent with the assertion in our

Declaration of Independence that such rights are God-given, the Bill of Rights merely states that, for example, "Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble". (Emphasis ours.)

The Bill of Rights comes not only from Virginia's Declaration of Rights (see App. D) and various state constitutions. England's 1689 Bill of Rights is longer than ours, but includes most rights found in ours (or in our original Constitution itself), even as to language. (See App. C.)

A more immediate antecedent to our Bill of Rights was found this July by a Library of Congress archivist. It is the only working draft known to exist, reports People magazine (normally an unlikely source for legal research, but we are pleased that it too is reporting on the Constitution), which quotes the draft as saying "The people have certain natural rights...of religion; of acquiring property, and of pursuing happiness & Safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good..." Such draft is more explicit than the final version, in asserting that the people have natural rights, but the magazine states that the final version is "substantially similar" to this draft, but "puts more emphasis on the judicial process and drops some provisions, such as the banning of monopolies." (Emphasis ours.)

Of the Amendments following the Bill of Rights, the one that still receives the closest scrutiny seems to be the 14th, ratified in 1868 and providing in part that: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Its "due process of law" portion is normally interpreted as extending to state action the restrictions imposed, by the Bill of Rights, against federal action. Its "equal protection" language is obviously broad, and general, but was interpreted, for example, in 1954 to require school desegregation--a clearly "activist" Court decision.

Most lawyers endorse "judicial restraint", and almost all Supreme Court Justices have observed it, in its normal meaning. When it serves as a synonym, however, for the concepts of "strict construction" (urged in the early 1970's), and "original intention" (urged since about 1985 by Attorney General Meese, and explicitly endorsed by President Reagan and Judge Bork), it appears to take on either or both of two meanings: statutes and the Constitution should be strictly construed in accordance with (i) their text (their actual words), and/or (ii) the intention of their drafters.

Much of this Statement, and of Appendix A, seeks to shed light on both narrow and general intentions of our Founding Fathers.

Some questions for those who feel that only the text of the Constitution should control:

> 1. Is there any mention of capitalism, or any particular economic system, in the Constitution (including its Amendments)? What protections are granted in the Constitution to "corporations" or other "businesses": is either term, or any similar term, even mentioned? Are not the Constitution's rights, privileges, and immunities granted only to "people" and "persons" and "citizens"?
>
> And is not even the provision that prohibits the taking of "private property", without just compensation, a final clause in a Bill of Rights paragraph that prohibits certain acts against a "person"?
>
> Have not the rights of corporations arisen from broad construction of the Constitution, and arisen in the absence of any specific or even general intentions by our Founding Fathers--who lived in a pre-industrial world consisting of a majority of farmers and a minority of individual craftsmen?
>
> 2. Two groups are, in fact, singled out for protection (although these groups comprise only individuals): The Constitution authorizes Congress "to promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries". (Emphasis ours.) This clause gave rise, of course, to copyright and patent laws (and may be an interesting comment on the activities and occupations deemed important to our Founding Fathers).

But for strict constructionists: did Congress go too far, by extending copyright protection to music composers? Is music a "useful" art, and a composer an "Author", and a song a "Writing"? Should we protect a song's lyrics, but not the music itself?

3. The Constitution prohibits laws "abridging the freedom of speech, or of the press". Whether or not the "press" includes radio and television, and whether or not we should impose, through interpretation, severely limited restrictions on these two freedoms, does the Constitution itself impose restrictions on these freedoms? And does it distinguish between these freedoms, so that one is more unfettered than the other?

4. What is the "judicial Power" vested in the Supreme Court, and in lower federal courts, by Article III of the original Constitution? (Not merely which cases, between which parties, but what is the actual nature and extent of such "judicial power"?)

5. Does the Constitution grant to the Supreme Court the sole right to invalidate, or declare unconstitutional, acts by legislatures or executives? (Or was this right merely claimed successfully in the 1803 case of Marbury v. Madison, by the conservative Chief Justice Marshall--who joined other conservatives like Hamilton in urging broad and flexible construction in order to have a strong national government?)

6. Are the Supreme Court's powers either the weakest--or the strongest--of those of the federal branches, because of the relative absence in the Constitution of both express grants of, or restrictions on, the Court's powers? (And is it not correct that, except for occasional "activism" by conservatives or liberals, the Court has traditionally demonstrated restraint in invoking its textually-unspecified powers?)

7. Do we learn in constitutional law

courses in law school that the greatest increase in a federal branch's powers has been in that of the President? Is this teaching correct? Has this growth occurred because of both acquiescense by Congress and broad construction, by the Court, of a President's "implied" powers?

8. Has the growth in Congressional power in such areas as regulation of states--and of individuals and corporations--arisen from broad construction of such powers as the one to "regulate Commerce...among the several States"?

9. Has the above interstate-commerce power been broadly construed to apply to entirely intrastate activities?

10. Have the above expansions of Presidential and Congressional powers, through broad judicial construction, occurred under conservative courts as well as liberal ones (and not merely in the early 19th Century)?

11. Is it correct that the Supreme Court initially, and from the Civil War until shortly after President Roosevelt's "court-packing" attempt, was a conservative court, and until 1937 a court that invalidated both federal and state economic legislation (including, for example, not only various 1930's federal statutes but also state statutes like the New York statute regulating bakeries, that was invalidated in 1905 in Lochner v. New York, a statute that limited the workday to 10 hours and the workweek to 60 hours, and that required proper ventilation and plumbing)?

12. Is it correct that such pre-1937 Court invalidated federal regulation by narrowly construing the Congressional commerce and taxing powers, and invalidated state regulation by broadly construing the 14th Amendment's due-process clause?

13. The 9th Amendment to the Constitution states: "The enumeration in the

Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." What are these rights retained by the people?

14. The 10th Amendment to the Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." What powers are thus reserved to the states, and what powers are reserved to the people?

15. Has the word "liberty", in the 5th and 14th Amendments, been broadly construed by conservative Supreme Courts to include "freedom of contract", especially for employers, and by liberal Supreme Courts to include the "rights of labor" to organize, to strike, and to engage in peaceful picketing?

We could continue, and include questions for those who espouse "intention" as well as, or instead of, "text". Many of the questions would be the same, or would reveal equally superficial reasoning by those endorsing "original intention". (We jest, but what were the framers' specific intentions on whether music is a "useful" art?) It can get complex, because this concept's proponents sometimes select "text", and at other times "intention"--apparently to achieve their desired results.

For example, the 14th Amendment refers only to equal protection for any "person". The text would thus appear to encompass women as well as men, but Judge Bork has said that women are not included because the specific or original intention was to protect only blacks.

What about corporations as "persons"? The Industrial Revolution in the United States did not pick up steam, figuratively or literally, until after the Civil War; yet early in such period, in 1886, the Court decided that corporations (and Chinese residents in America) were "persons" under the equal-protection clause. Are corporations and Chinese residents more worthy of broad-construction benefits than are women?

Judge Bork approves, however, of the 1954 cases requiring integrated schools, not separate-but-equal schools (one of the very few instances in which he has not opposed attempts to let blacks share the rights and benefits enjoyed by the rest of us). He reasoned that separate-but-equal education violates the equal-protection clause--but the drafters of the 14th Amendment, who probably had no "specific" or "original" intention to protect women, also had no such intention to prohibit "separate" but equal schools. Their clear intention was to initiate only the "equal" concept; they regarded (and the Court regarded, until almost a century later) separate-but-equal education (and railroad coaches) as entirely acceptable.

"Original intention" as a rigid principle has long been discredited, partly because it simply does not work; hence neither conservative nor liberal courts have usually adhered to it. Our group was recently told by the Dean of a prominent law school that, in effect, each law-school freshman learns this for himself, by considering and testing the principle, then rejecting it. We were not surprised.

--A Tool for Listening and Acting--

We have a confession to make, and with it a suggestion. It is not lawyerly to say we "feel" (or even "believe") that a particular decision or theory is correct; nor to say that it is "fair". "Feeling" connotes emotion. We prefer thorough research, and rigorous intellectual analysis. "Fairness" is too subjective (although it is the accepted foundation of "due process"), too weak a foundation for a theory or principle, and too general a word to impress our clients and justify our fees.

The older among us confess: Part of what we like to call "good judgment" or "wisdom" is really "feeling". With considerable reluctance and embarassment, we quote and endorse what one of our group has said--and what never will be heard in a law school unless somebody refines it and makes it sound intellectually "respectable":

"Many of us had a real problem analyzing what bothered us about Judge Bork's views. We're all fond of William Buckley, and he often makes valid points, but reading Judge Bork's views was usually like listening to some of Buckley's television comments: glib, somewhat arrogant and condescending, and somehow "wrong", but--at least superficially--persuasive, rational, and logical. Our confusion was embarassing: we're used to dealing with complexities, and with words; that's our job and we're supposedly good at it.

"We finally discovered our problems with Judge Bork, but we wasted a lot of time by concentrating initially on only intellectual analysis, instead of first trusting our visceral feeling that something was wrong, and then doing the intellectual analysis.

"Remember that feisty but courteous Congressman Fascell from Florida, in the Iran-Contra hearings? After listening to the Colonel's and Admiral's explanations, he looked puzzled and said something like: "Then how come I don't feel good about it?" He said it all, right there, and deserves immortality.

"Feeling is part of the answer, but don't trust "feeling" with the heart instead of the stomach. Whenever somebody says he "knows in his heart", or "believes from the bottom of his heart", that something is true or right, we know we're going to hear the prejudices enshrined in his head. Same problem with a "gut-reaction": it may be the right kind, but it may just mean an initial "top-of-the-head" reaction.

"The word "Justice" is too abstract to be meaningful. People want their courts to be Fair. Everything else is mostly frosting on the cake. For the whole cake, people might want courts to render Justice: to be Reasonable, Fair, Impartial, and Consistent.

"But they'll probably settle for Fair: that to be Fair is to be Just. The trick is to give those words meaning, and not merely to play clever mind-games with them.

"The word Reasonable is meaningful for lawyers--a word of the mind. But the best meaning for the three other words lies in the Traffic Court.

"If you're in Traffic Court because you drove 50 where the speed limit was 35, you may be annoyed as the devil, and may be angry and worried (as many of us have been) about losing your license or having your insurance-premium raised. Let's say you are found guilty and are fined $50. If despite your anger you accept the judge's decision, then what you reluctantly feel--in your gut--is that it's Fair. And that's the only safe and honest meaning for Fairness.

"If the Judge who fines you is a black war-veteran, who knows that you were an affluent college kid who went to Canada instead of Vietnam, and who still charges you only the same $50 that he charged the black lawyer who preceded you (who also drove 50, but who fought in Vietnam), then what you gratefully feel, in your gut, is that it's Impartial. The only meaningful Impartial.

"If your friend who got fined two months ago, for the same offense as yours, also got fined $50, then what you feel, in your gut, is that it's Consistent. Truly Consistent.

"(On occasion it's okay to be inconsistent, but such inconsistency must itself pass the test. If the legislature says that speeding fines shall now be $100 instead of $50, you're stuck with it, but so is everybody else. And if, in applying the test, you (either eagerly or reluctantly) agree that changing conditions, or past injustices, or new technologies, seem to require or at least justify a change, that's okay, because you feel that the change passes the test. If you so agree, then you accept the change; if you disagree, protest it, but peacefully.)

"So that's the Traffic-Court test for "Justice": test "Reasonable" with your mind, but test "Fair", "Impartial", and "Consistent" mostly with your mid-section. The test works for everything: for what's said or done by a court, or by Congress, or by the President, or by other people, or by yourself. It's what is behind such expressions as "I can't stomach it", and "It makes me queasy", and "Is your conscience clear?", and "Can you sleep nights?", and "It doesn't feel right".

"Some people lack this neural connection between their brains and their mid-sections. William Neikirk recently said it better, in his weekly Sunday Chicago Tribune column: "You cannot do it [return America to a "sense of community that once bound us together and gave each other strength"] by letting the best minds in the country graduate from college and run amuck on Wall Street, violating the most basic human values in search of personal wealth via hostile takeovers and insider trading." (Emphasis ours.)*/ (And a current news column discusses the conviction of a 34-year-old lawyer for insider trading.) We see these people in business, law, and elsewhere--the amoral hustlers, intellectually or otherwise, to whom the worst sin is to be "naive" or "idealistic". They're intense, often humorless, the moral and economic relativists who loftily view themselves as "realistic" and "pragmatic"; they see only "gray"--not a messy and complex mixture of "black" and "white".

"They work hard, and deserve their material success, but seem devoid of any concern for Neikirk's "most basic human values": they seem to lack the ability to feel, or to feel concern for, what is merely "Fair"--they seem to suffer from a missing chromosome. And some seem to have this basic sense of Fairness in their family life, but lack it or repress it in their public or professional life--where they may make a "correct" decision, but not the "right" one.

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*/ This concern is reflected in a 1986 report issued by the Commission on Professionalism of the American Bar Association. The report recommends in part that "All segments of the Bar should: 1. Preserve and develop within the profession integrity, competence, fairness, independence, courage and a devotion to the public interest...[and] 4. Resist the temptation to make the acquisition of wealth a primary goal of law practice."

"So the best advice we can give people is to suggest that they apply the Traffic-Court test--the true meaning of "Justice"--both to learn if others are speaking with forked tongues, and to learn if they themselves are listening with plugged ears. And also to test their own remarks and actions."

Perhaps we should give an example or two, of the apparent missing chromosome and the usefulness of the Traffic-Court test. In commenting on a proposed Congressional statute, Judge Bork condemned it as "legislation by which the morals of the majority are self-righteously imposed upon a minority." (This evidently preceded his "majoritarian" period.) Reasonable? Of course. Does it feel Fair? Yes. And it was a concern, expressed at length, by conservative as well as liberal Founding Fathers. But in this instance the majority included Congress, and the legislation was the 1964 Civil Rights Act's public-accommodations section, requiring hotels and restaurants to serve blacks. So the oppressed "minority" were not the blacks, but the owners of hotels and restaurants. Reasonable? Only in theory, not in practice. Does it feel Fair? Not to us.

One other example. A Justice Department lawyer argued before the Supreme Court that a state statute should be upheld on the grounds of "tolerance". Reasonable? Of course. Does it feel Fair? Yes, and this too was, and remains, an underlying concern in our constitutional system. But the Alabama statute was sponsored by a State Senator whose intent was explicitly religious, and this 1981 statute provided for a period of silence "for meditation or voluntary prayer" in public schools. The Justice Department lawyer decided that the spoken-prayer issue*/ was "a kamikaze mission", since it (conflicted directly with earlier Court decisions and) was "an issue for which the intellectual preparation had not been done." Was "intellectual preparation" the only missing element? Or do we think, and feel, that it simply is wrong, under our Constitution and our standards of fairness and tolerance, to require prayers in public schools or to prohibit prayer outside of schools?

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*/ This had been ruled upon when the Court invalidated a 1982 Alabama statute that authorized teachers and professors "in any public educational institution" to either "lead willing students in prayer" or lead them in a prescribed prayer, of about 60 words, to "Almighty God...[who they "acknowledge" is] the Creator and Supreme Judge of the world." [The Justice Department lawyer's comments quoted in this paragraph are from The New Yorker article referred to on page 35.]

The silent-prayer issue, as "a moment of silent prayer", was argued as "an instrument of toleration and pluralism, not of coercion or indoctrination." Does this feel Fair? Whether or not they approve of public-school prayer, would most Americans regard public-school prayer, whether spoken or silent, as something that would be "permitted" and "tolerated", or as something that, even as "meditation", would be "required"? A majority of the primarily conservative Supreme Court rejected the argument, with a majority opinion that said in part that "the political interest in forestalling intolerance extends beyond intolerance among Christian sects--or even intolerance among "religions"--to encompass intolerance of the disbeliever and the uncertain" and "that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." Is that Reasonable? Does it feel Fair? We think the answer to both questions is yes, but certain factions in America vehemently disagree with both us and the Court.

A footnote on the above opinion: one Justice, who concurred with the majority primarily because of the "official legislative history" of the Alabama statute, nonetheless stated that "moment of silence laws in many States should pass Establishment [of religion] Clause scrutiny because they do not favor the child who chooses to pray during a moment of silence over the child who chooses to meditate or reflect." Reasonable? Of course. But if such statutes are upheld, will the sponsoring legislators (who will refrain from mentioning prayer or religion in "official" legislative history) and the local and national media--and the parents of many of the school children--talk about "meditation" and "reflection", or will they trumpet a victory for school "prayer"?

And what will be in the minds of the children, and what will they say to each other, about this "moment of silence"? We adults like to think we are not fools, to be fooled by such "reasonableness", but--even apart from what many parents would explain to their children--perhaps we should not underestimate our children's intelligence, and their occasional cruelty: the Alabama parent complained that his children not only had "been subjected to various acts of religious indoctrination" in school, but also "were exposed to ostracism from their peer group class members if they did not participate".

--A Major Concern--

Most of us admire certain traits and achievements of President Reagan. We are confident, and comfortable, about his basic decency. He has done a good job on holding down inflation, though that is offset by our increased national debt and trade deficit. He is a patriot, has kept us militarily strong, and is negotiating from strength in his disarmament discussions--in which we wish him, and thus all Americans, success. He represents all Americans, and his success is America's success.

Priorities

Is something amiss, however, when we read in a Chicago Tribune article entitled "Reagan wish list begins with Bork", that the President says "there is no more important task" than securing the confirmation of Judge Bork to the Supreme Court? (Emphasis ours.) We are disturbed by the advice to which the President has been listening.

Should the top priority in the President's agenda for the remainder of his term be to try to implement, through a Supreme Court appointment, a "social agenda" that has been rejected by Congress? Should the President and Congress be spending time on reversing Court precedents on issues like abortion, school prayer, and one-man-one-vote? The answer is clearly yes, in the minds of the more radical members of at least two religious groups. But the answer seems to be no, in the minds of the majority of members of Congress--and the majority of traditional moderates, liberals, and conservatives.

Are there not more pressing domestic and foreign issues our government should be addressing, such as how to start whittling away at our national debt and our trade deficit?

The Neikirk Chicago Tribune column mentioned earlier was written by a man we have not heard called "liberal", and appeared as usual in the "Business" section of his newspaper. If it had instead been on the front page, and if Americans and our government were to heed it, this Statement would be unnecessary.

In a departure from its usual business-reporting, Neikirk's column deplores the loss of a sense of community that once bound us together, and says that "Americans respond to greed, not need." Perhaps Mr. Neikirk and the Chicago Tribune will forgive us for quoting an entire paragraph, which tersely says much:

> "Somehow, it has been forgotten that an economy is nothing more than a sense of community. It exists for people, not the monied interests. Capitalism does not have to be a dog-eat-dog, deterministic system where people do not matter and where chasing after money is the only endeavor."

(Abraham Lincoln, the father of the current Republican Party, had a similar thought in 1859: "Republicans are for both the man and the dollar, but in case of conflict the man before the dollar." We suspect that missing-chromosome persons will find Neikirk's and Lincoln's remarks--and the ABA Commission's comments, quoted earlier, against making acquisition of wealth a primary goal--merely "quaint", "unrealistic", and "amusing".)

Neikirk condemns also the government's "ignoring the problems of the homeless and the poor" by failing to consider programs that would help them, and its "running a big federal deficit", and its "pursuing [incorrect] economic policies", and its "denying minorities their right to economic opportunity", and its "trying to blame someone else for the fiscal irresponsibility", etc. Neikirk directed most of his comments to the President, but many apply as well to Congress, businessmen, lawyers, publishers and editors, and most other Americans.

So there is a question of priorities. A serious question.

Dissension

We will blatantly lift out of context two other Neikirk comments, but for a purpose that seems consistent with the spirit of his column. He said that we cannot return to a sense of community "by playing to the worst instincts", and that the President "does not see how his policies have created a hard-edged world".

Does the President not realize that his support for his "social agenda"--urged upon him by the radical segments of two or three religious groups--appeals to Americans' worst instincts, not their best instincts? That this agenda emboldens radicals to coerce and repress individuals, through the enforcement of the moral views of state legislative majorities? That those majorities (and the majorities in cities and in Congress) can change, have changed, and will change--and thus that today's oppressors may become tomorrow's oppressed?

Does the President not realize the wisdom displayed by our Founding Fathers when they imposed numerous restrictions on the possible barbarities imposed by majorities or minorities? The barbarities occur when their proponents are plagued by the missing chromosome--and therefore flunk the Traffic-Court test. This is not a matter of "liberals" or "conservatives": barbarities may come from either group.

An essential role of our decidedly "undemocratic" Supreme Court Justices, who are appointed for life, is to remain above the fray--and not be part of it, except when they must apply the Traffic-Court test themselves because America's majorities, minorities, or governments have failed such test. Such involvement by the Court may sometimes be "activist", but it always should be deemed "conservative"--as conserving and protecting the fundamental structure and rights set forth in, or underlying, our Constitution. Some Americans need those rights protected today. Any one of us may need those rights tomorrow.

Does the President not realize that majority rule should be the norm, but that tyranny and oppression may arise from majorities, minorities, or government, and should be resisted, always? That it would be as wrong to require abortions as to prohibit them, and as wrong to prohibit private prayer as to require public prayer--that the common evils are coercion and repression, and the supremacy of Authority over Liberty?

The President's support for a social agenda of radicals emboldens them to repress those of us with traditional, tolerant (and therefore Constitutional) religious views. Could Presidential discouragement of "pro-life" venom and violence make less likely the bombings of birth-control clinics? Could an earlier President, if he had spoken up, have made less likely the death threats, and a bullet through a window, for the conservative Justice who wrote the majority opinion in the 1973 decision legalizing abortion? Has not the concept of "disagreement" run amok?

Still earlier, another President did speak up. Many Americans may have heard a recent public-radio report (apparently one of a series on the Constitution), describing reactions to the Supreme Court's 1962 decision that invalidated State-sponsored oral prayer in New York public schools. There was an uproar by critics of the decision. Radicals ignited, on the driveway of the parent who challenged the law, rags piled in the shape of a cross, and telephoned his home "24 hours a day" for a week. But the President stepped in fast, to try to calm things down. Only two days after the Court's decision was announced, the President called a press conference, and told America that if we are to uphold the principles of the Constitution, it is important that we obey the Supreme Court's decisions, even when we don't agree with them. That President was John F. Kennedy. (But does that matter: should a conservative president who stresses "law" and "order" be less concerned about upholding Court decisions, and avoiding domestic turmoil, than a liberal or moderate one?)

These radicals also seek to repress America's involuntary immigrants, its blacks who seek to have their votes rank equally with others (the one-man one-vote, legislative redistricting issue). Blacks, like other Americans, also seek jobs. (We do not defend all affirmative action programs, since it is unclear that all have been wise or even very effective, but we defend the concept of trying to rectify past injustices in a sensible and effective manner, and to help anybody--especially someone with a vote equal to ours--become as educated and well-off as possible. Here, America may fumble and bumble, as on many other matters, but let us not give up, either on blacks or on anybody else.)

America faces an ominous possibility. We are earnestly concerned that success of the social agenda would rekindle animosities and tumult, in state after state, as the abortion, prayer, and other issues would be fought anew. (We have not researched this point, but perhaps a majority in Congress shared these concerns, when they rejected the social agenda.)

But what, also, will be the reaction of the Silent Majority--still probably a meaningful term--when they see in a Newsweek photograph that their freedoms are threatened by an anti-abortion group led by men linking hands and wearing "Knights of Columbus" apparel. And when they read, in Life's description of a Supreme Court case, a lawyer's comment that one Justice "is a devout Catholic down the line. On abortion we'd have no chance...."

This, as well as similar publicity on the efforts of radical members of fundamentalist Baptist and other religions, is dangerous. It also is an affront to Catholics and Baptists who--in varying degrees, but noticeably-- have demonstrated religious tolerance in their public actions: not merely President Kennedy, but also Senators Biden, Byrd, D'Amato, DeConcini, Gore, Grassley, Harkin, Hatfield, Kennedy, Kerry, Leahy, Mikulski, Mitchell, Moynihan, Murkowski, and others--and a World War II Colonel awarded the Legion of Merit, who is now called "Justice" William Brennan.

Should Americans take off their (public) gloves, and rekindle their private prejudices and come out fighting? Fundamentalists and Catholics versus the rest of us? That is an ugly thought, and the actions would be uglier--and grossly unfair to the non-radical members of those religions, who (like most lawyers) are not speaking up against coercion and violence, or for the Rule of Law. We Americans have been down that ugly road; worse, our baser instincts like that road.

Mr. President, please listen to Mr. Neikirk: help us stumble along, to regain our sense of community. Help not to divide us, but to unite us. You recently led the nation's children in a pledge, and we urge you to encourage and help us to be one Nation, indivisible, seeking Liberty and Justice for all.

And yes, one Nation under God, for most of us. But as our forebears decreed in the Constitution, still a Nation that accepts disbelievers as well as dissenters.*/

Personal Government--the Executive Office

Some in our group might advise the President: If you can get unanimous approval, on any one issue, from Secretary of State Shultz, and Secretary of Defense Weinberger, and (from our respect for his integrity in the Watergate hearings) your Chief of Staff Howard Baker, go ahead with your proposed action. We would say the same for the unanimous approval of Senators Rudman and Inouye, and Congressman Hamilton, after the Iran-Contra hearings. (Or Senators Cohen, Mitchell, and Nunn, or others like Senator Heflin, whom one of us calls "Iran-Contra's counterpart of Watergate's Sam Ervin--a conservative who cares about Constitutional Law.")

But our invitation would be an empty gesture: we know that the same men we probably would trust, for "Personal Government" and "Rule of Men", would decline the invitation because of their belief in "Impersonal Government" and the "Rule of Law".

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*/ Baptists (one of whom was Martin Luther King, and a faithful multitude of whom are also black) may find it interesting that under lists of Protestant religions the group called "Dissenters" includes Congregationalists, Quakers, Unitarians (like Senators Cohen and Packwood), and Baptists. In theory these Dissenters, who have sought tolerance for their dissent, could be--and in most such denominations are--among the most tolerant of Christians, since they are "congregational": either having no formal leaders or having "non-governing" leaders. In short, they at least in theory are people who think for themselves, rather than meekly obey authoritarian or demagogic leaders.

And Mormons might ask if the discrimination suffered by them from "Gentiles" in New York, Missouri, and Illinois (and a mob's murdering of Joseph Smith), and their faith's fervent belief in the interdependence of spiritual and temporal life, require them to insist that others observe such rigorous interdependence.

Most of us who belong to other Christian or non-Christian religions seek to reflect our spiritual beliefs in our temporal lives, but our fallibility is apparent even to us. (Senator Simpson has noted at the confirmation hearings that all Senators on the Judiciary Committee "have flunked the test of perfection", and added "That's the way it is. It's called real life.") Since most of us expect and need tolerance, should not we also--from self-interest, as well as fairness--bestow it upon others?

Perhaps Attorney General Meese has been getting bad advice: he has said that "each of the three coordinate branches of government created and empowered by the Constitution--the executive and legislative no less than the judicial--has a duty to interpret the Constitution in the performance of its official functions", and that the Supreme Court's interpretations of the Constitution do not establish a "Supreme Law of the Land." The first is a seemingly innocuous statement, but the Executive Office has shown that this pronouncement has also been extended to congressional statutes as well as to the Constitution, and that such "duty" to interpret has become a much-exercised "right" to interpret--and thus to justify Personal Government.

The pronouncement's impact is twofold. One is discussed in the following section of this Statement. The other is that the executive branch is deemed to have the right to interpret, and to determine the constitutionality of, any statute or executive action. That is the Rule of Men, not the Rule of Law. At the federal level, that also strikes at the very heart of not only the concept of separation of powers, but also the concept (established in Marbury v. Madison in 1803, and accepted since then) that it is the Supreme Court which has the sole federal power to decide, finally, on the constitutionality and correct interpretation of both federal statutes and the Constitution--and thus to declare what is the Supreme Law of the Land.

Americans have seen instances of Personal Government in most administrations, but saw the inevitable and extreme Personal Government consequences of the Meese rationale as they watched the Iran-Contra hearings: two obviously dedicated and patriotic men, a Lieutenant Colonel and an Admiral, expounded at length on their and others' personal interpretations of federal statutes (except, when convenient, they declared that they were not lawyers). The Colonel said, for example, that he knew that it was illegal for the CIA to give certain information to others; but as he interpreted the relevant statute it was lawful for the CIA to give him the information, and for him to give the information to others. (Does that pass the Traffic-Court test?)

Americans also learned that the Colonel and the Admiral, and others in the executive branch, chose to implement such personal interpretations by misleading Congress and without first asking a court to determine the correctness of such interpretations, which they knew were different from those of many or most members of Congress. Later expressing his own personal interpretation, our President's description of the hearings was that he hadn't heard anything about any laws being broken. Perhaps he is right, in which case the Iran-Contra independent counsel (the current term for "special prosecutor"), and the federal courts, will not reach a different conclusion.

Personal Government--the Justice Department

This section is primarily a summary [except for our comments, which we have tried to enclose in brackets] of an article written by a man who, during a period of more than two years, interviewed most Supreme Court Justices, numerous Court "clerks" [cream-of-the-crop law school graduates], all living persons who have served as Solicitor General of the United States, many of the Solicitor General's staff [also cream-of-the-crop], and numerous other lawyers.*/

[Non-lawyers neither know nor care about the Solicitor General.] He argues the executive branch's cases in the Supreme Court. The Solicitor General is part of the executive branch's Department of Justice, and thus is technically under the control of the Attorney General. But the Solicitor General also has an office in the Supreme Court building, and is sometimes called the "Tenth Justice" because of his intimate connection with the Court, and his influence upon the Court.

The Solicitor General walks a tightrope between the executive and the judiciary: he must represent the executive's position, but is relied upon by the Court (which has only a limited staff) for independent, thorough, and unbiased legal advice and assistance.

So strong is the heritage of the Solicitor General's independence and freedom from political pressure, within the Justice Department, that by tradition the Attorney General does not normally give advice, let alone orders, to the Solicitor General. The Attorney General is asked for his advice--if the Solicitor General wants it.**/

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*/ The article is "Annals of Law: The Tenth Justice", by Lincoln Caplan. It is lengthy, and was published in two parts, in the August 10 and August 17, 1987 issues of The New Yorker--which is renowned for superb and thoughtful writing. The excerpts on pages 27, 34-38 and 45 are taken from these issues of The New Yorker and are subject to the magazine's copyright. The use of the excerpts does not imply an endorsement by The New Yorker or Lincoln Caplan.

**/ This conclusion was confirmed in an unprecedented Justice Department memorandum on the role of the Solicitor General. This was prepared in 1977 when certain Cabinet officials in the Carter administration complained that they had not been allowed sufficient influence over the Solicitor General's office. The (Cont'd)

Under the current administration, the situation has changed in the last several years. "Judicial restraint" means judicial activism to the President--achieving in the courts what he could not achieve in Congress. The President explained in June of 1986, in a Los Angeles Times interview: "Well, you have found that Congress has been unwilling to deal with these problems that we brought up". And when asked whether he agreed with Patrick Buchanan's statement that "If you get two appointments to the Supreme Court it could make more difference on your social agenda in achieving it than twenty years in Congress", the President said "Yes."

[Such attitude has given rise to references to this administration's "litmus test" (a now tiresome phrase): that a person will not be nominated to federal courts (now 40% staffed by Reagan appointees), especially the Supreme Court, unless he demonstrates fealty to the social agenda. This test and the reactions to it from potential candidates have been amply reported in the press. The comment in Life that "some believe she [Justice O'Connor] was dropped from consideration as Chief Justice because she strayed from the conservative wing on key cases, voting for expanded libel protection for the press and against school prayer" (emphasis ours), indicates that even partial disagreement on the social agenda may be a sin more cardinal than venial.*/]

A theme running throughout the article is that the same adherence-to-creed requirement has been applied to appointments to, and activities of, the Solicitor General's office. As to appointment of the Solicitor General, a lawyer in the Solicitor General's office said "The Attorney General made it absolutely clear how far the government was going to go. Charles couldn't afford to give a hint of ambivalence about the [abortion] position or he would have dropped out as a candidate for the post." With respect to pressure from the Attorney General and

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article in The New Yorker quotes lengthy portions of the memo, including that the Solicitor General "must "do justice"--that is, he must discharge his office in accordance with law and ensure that improper concerns do not influence the presentation of the Government's case in the Supreme Court" and that "the Attorney General and the President should trust the judgment of the Solicitor General not only in determining questions of law but also in distinguishing between questions of law and questions of policy".

*/ [As an aside: women like Margaret Thatcher, Golda Meir, and Indira Gandhi have successfully led nations. We would have no problem whatsoever with a female Chief Justice.]

others on the positions taken by the Solicitor General's office, and to such other matters as appointment of a "political deputy" as Deputy Solicitor General to act as an intermediary between the Attorney General and the office, and the active involvement of an Assistant Attorney General in the office's decision-making, the article is replete with details--and well worth reading.

The extent of these politicizing actions, and the incursions against the independence and integrity of the Solicitor General's office, is unprecedented. [We have heard of nothing remotely approximating them in any prior administration, Republican or Democratic, or moderate or liberal or conservative.]

The consequent change in Supreme Court Justices' and their law clerks' attitudes toward the Solicitor General's office was predictable. From the clerks [the best and brightest law graduates, like those in the Solicitor General's office]: "We don't trust the S. G.'s submissions the way previous law clerks told us they did"; and "Now he [the Solicitor General] omits key cases--and in the law that is a form of dishonesty--or he sneaks around precedents [earlier court decisions]. This is not just a bureaucratic squabble. It's a break with a long tradition"; and "This isn't something I want to be part of. It's tainted. The office doesn't seem to be a place where integrity reigns. It might change but not for a long while."

The effects within the Solicitor General's office have been dispiriting. The article explains, in impressive detail, how staff members who have stayed, and new staff coming in, have had reactionary orthodoxy imposed upon them. And part of the article's description of the reaction of the assistants in the Solicitor General's office is that "they seemed to be a wounded, bewildered lot. They were contemptuous of what they considered crude legal notions emanating from the A.G.'s office".

Seven of the nine Justices were willing to speak: One said that the Solicitor General's standing as an advocate was still relatively high, especially among members of the Court's right flank, and that "His [the Solicitor General's] writing always has influence....[Former] Chief Justice Burger [whose retirement led to the appointment of Judge Scalia as an Associate Justice], Justice O'Connor, [and the present Chief] Justice Rehnquist--they've always been interested in what the S.G. says, and gain support from his briefs for positions they want to espouse." But one Justice said the Solicitor General's office is too aggressive; another, that it is too supercilious; and another, that it is too willing to be a spokesman for the "reactionary" Reagan Administration. One Justice said: "I'm a little biased, I suppose. I think that Archibald Cox and Erwin Griswold [each a former Solicitor General] got it right. They thought they had a basic responsibility to the Court as well as to the Administration, and they were not the political voice of the executive branch."

[Archibald Cox and Erwin Griswold are--in the opinion of virtually all lawyers in our group and, we believe, most lawyers among Judge Bork's supporters--men of impeccable integrity, and among the most distinguished and respected of America's lawyers and legal scholars. Mr. Griswold, a Republican and a long-time dean of Harvard Law School, was appointed as Solicitor General by President Johnson.]

More from the Justices: "It's ideology, pure and simple. It's an assault on settled practices." And "I'm not even sure in some cases that the facts are accurate. In the past, I didn't have that uneasy feeling about the S.G., but today I do." And "What we're saying to him [the Solicitor General] and the other people in the Justice Department is simple: "Listen, you guys, you're just dead wrong. This is an abdication of your responsibility." The notion that the S.G. has no obligation to help the Court is an outrage."

[The foregoing may be of no interest to non-lawyers. We can assure them, however, that the questions of whether a lawyer's "word is good", and of whether we hear "straight talk" from him or her, are not matters on which you will hear much levity from the lawyers in our group.]

--A Likely Concern--

The nomination of Judge Bork is, as should be clear by now, merely symptomatic of a more pervasive and perversive problem: the accomplished politicizing of the Justice Department and the attempted (and, to a marked extent, accomplished) politicizing of the federal judiciary, primarily in pursuit of a social agenda. ("Politicizing" is too gentle a term; "subverting" may, but only may, be too harsh.) We have witnessed an unsettling degree of Personal Government.

Moderate and liberal Senators have for many years been reluctant to oppose Supreme Court nominations. Conservative Senators seem to have shown less reluctance, as evidenced by the Fortas controversy discussed earlier.*/

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*/ And by the confirmation proceedings of the eminent conservative, Justice Frankfurter. We recommend John P. Frank's Marble Palace, as well as his numerous other books and articles on the Supreme Court, to those persons (of whatever persuasion) (Cont'd)

A vital point, however: traditionally, an essential cause and concomitant of Senate restraint has been Presidential restraint. Presidents have usually nominated persons who fall within the traditional liberal-moderate-conservative mainstream. Ideology has often, perhaps usually, been a factor. But most Presidents have had broader, usually economic, considerations in mind. Prior to World War II, the major difference between liberals and conservatives was primarily in their views toward economic regulation (and, especially prior to the Civil War, their views on the relative powers of state and national governments).

The current President's "social" agenda _is_ primarily social, in that it is directed in part at American's private lives (abortion) and religious views (school prayer). But with respect to blacks, it is also a political agenda (equal representation) and economic agenda (affirmative action). The common credo in the agenda is that Authority may intrude upon the privacy, and repress the political and economic rights, of the Individual.

A further distinction is that the litmus tests of earlier Presidents have not been accompanied by an "anything goes" approach to federal court appointments. Earlier Presidents have normally respected the Constitutional independence of the federal courts. (See App. B, however, for brief discussion of the 1937 court-packing attempt.)

The lack of restraint in this Administration's nominations has been startling, and the confirmation of certain prior nominees to federal courts should perhaps be attributed more to inattention by the Senate, lawyers, and the press than to any other factor.[*]

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who seek further information on Supreme Court appointments and history. Mr. Frank is a fine lawyer, of unquestionable character. In his books he provides a combination rare among lawyers: scholarship and readability.

[*] In this area, as in some others, it probably is unfair to blame the press too much. Few newspapers have legal-reporters. We salute _The New York Times_, for its extensive and continuous reporting, both before and during Judge Bork's five days of testimony; _The Washington Post_, if not for editorials then at least for a lengthy analysis of Judge Bork (which was carried as a three-part series by such smaller papers as New Hampshire's _Concord Monitor_); and the _Chicago Tribune_, for reporting at length on the first two of the five days of Judge Bork's testimony, and for its stimulating editorials--that do not disclose that they are written or approved by a friend, and (Cont'd)

Our Preparation

Our lawyer's group has studied most of Judge Bork's writings, and a seemingly endless number of magazine and newspaper articles, columns, and letters to editors. We also reviewed materials and reports prepared by various individuals and groups (including the White House's July 31 package of materials sent to Senators). We held three meetings at which we listened to addresses from two law-school deans and one of the country's most highly-regarded, conservative, constitutional law professors. We also conducted our own legal and historical research. Not least (although most of the prior part of this Statement was drafted earlier), we waited for and listened to Judge Bork's testimony at the Senate hearings.

Judge Bork's Proponents

We have studied the articles and columns of Judge Bork's supporters, perhaps even more closely than we have studied his opponents'. Brief responses to some of his supporters' comments and arguments are in Appendix B.

The Chicago Tribune reported on September 9: "In a speech to political appointees summoned to the White House", the President "sought to portray his conservative nominee as a political moderate" and not, as critics have charged, "some kind of right-wing ideologue". Newsweek said on September 14 that Judge Bork "is certainly not, as the Reagan White House has recently tried to portray him, just another political moderate", and quoted a senior White House aide who said that such portrayal is a mistake, and who added: "The truth is that he *is* a right-wing zealot. But that doesn't mean every decision he makes has a right-wing bias to it." (Emphasis is aide's, not ours.)

There is little need to respond to the comments depicting Judge Bork as a moderate, or to describe what the press has covered well: the clash between Justice Department "ideologues" who wanted to let the extremist aspects of Judge Bork emerge openly (as was done in speeches to conservative groups), and the White House "pragmatists" and the image-makers (one of whom has attended the hearings and accompanied Judge Bork on Senatorial interviews) and lobbyists retained by the White House. Evidently the pragmatists carried the day, presenting Judge Bork as a "moderate" or at least as a judge no more conservative than Justice Powell.

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former student and Justice Department colleague, of Judge Bork.

We applaud Judge Bork's apparent refusal to attend more than one of what Newsweek tells us is known as a "murder board" within the administration--a mock trial of tough questions and answers to prepare a nominee for Senate questioning. And we have seen no public indication that he sought advice from the image-makers; we have seen a "new" Judge Bork at the Senate hearings, but perhaps he is heeding only his own instincts. Judge Bork is his own man, and evidently did most of the preparation for the hearings. We respect him for this.

It is equally true, however, that Judge Bork's moderation at the hearings is difficult to reconcile with the injudicious language and contempt of most of his speeches and writings, even the recent ones in 1985, 1986, and this year. We will not discuss that further, but it is reflected, in part, in the comments of Judge Bork's Yale Law School faculty colleagues and friends: any interested reader might compare the substance and tone of those comments (quoted in The New York Times) before Judge Bork's testimony began (see July 27 issue), with those after two days of testimony (see September 18 issue). A milder characterization of the latter comments is that his testimony "seems to be leaving his former colleagues more pained than proud." One quoted professor is both candid and humble: "I think he's had it, but my intuitions of American politics are notoriously bad."

Our intuitions are no better: In the Iran-Contra hearings Americans had to decide, for themselves, which members of Congress were talking "straight", and which with "forked tongues". Americans have the same task again--and with some repetition in the Senators who are involved.

There are some intellectual heavyweights among Judge Bork's supporters. These are the ones we studied closely--to see if we had missed something in our own analyses. (We will not discuss here the superficial and "clever" arguments by less prepossessing writers.)

We are struck by one recurring theme among the heavyweights we respect: with very rare exceptions, they sometimes discuss his court decisions, but usually do not discuss the merits of Judge Bork's specific extra-judicial views and theories. They applaud his intellect, his personality, his experience, his "judicial restraint" (or at least his "belief" in or "respect" for it), and the fact that as a Circuit Court Judge he has never been overruled.

The Judge's supporters fail to mention that, as he stated in the Dronenburg case, Judge Bork at least nominally accepts that as a lower-court judge he must obey the rulings of the Supreme

Court; the Dronenburg case includes an interesting commentary by other judges on the unrestrained "activism" of Judge Bork's opinion. We respect him, however, for such nominal acceptance. But Senators will be reviewing the court opinions, including gratuitous commentary, in which such acceptance seems to have been only nominal. Senators also will have to decide whether more weight should be given to his court opinions, on which he concedes he is constrained, or to his extra-judicial articles and speeches, where the only constraints are self-imposed.

Some of the heavyweights, and many other proponents, deplore discussions of ideology--although it clearly was Judge Bork's ideology, perhaps more than his acknowledged intellectual prowess, that gained him the nomination he sought. (Such proponents are silent on the Fortas controversy, discussed earlier under "Nonsense and Sense".)

They also castigate the use of only "snippets" of Judge Bork's comments (that word is becoming as tiresome as "litmus test"). The "snippet" argument of Judge Bork's proponents seems unsupported. Most serious analyses, of the many we have seen, have fairly reflected Judge Bork's statements and opinions, whether the quotations used have been snippets or lengthy. The unfair ones are those that fail to reflect genuine changes in his views, where such changes have in fact occurred. We have, for example, read extensive quotations from Judge Bork's pre-Nixon period, describing at length his reservations about exclusive reliance on drafters' "intent" (the principal passage was quoted by Senator Specter at the hearings and is one with which most in our group, and probably most lawyers, agree), and, equally extensive, more recent quotations and articles describing his current reliance on such "original intention". In both cases, we at least learned his views, which is all we sought.

We are troubled more by the absence of snippets, let alone extensive quotations, from Judge Bork's heavyweights; we learn little, and are given almost nothing with which to either agree or disagree.

Judge Bork's supporters ominously warn us that the choice is between Judge Bork and "mediocrity"--that one or another eminent Justice would never have been confirmed if the Senate refused to confirm strong, controversial persons.

The "mediocrity" argument has potential merit, if presidents were in fact to nominate only non-controversial persons. There have been mediocre Justices, but we will leave to those more learned the question of which mediocre Justices were appointed because they were non-controversial, and which because they were carefully selected by presidents but happened to be mediocre.

Do not most of us agree, however, that some of the finest Justices were controversial, but were confirmed, and nonetheless were within the traditional liberal-moderate-conservative spectrum? This curious argument about "mediocrity" also seems to imply that to get the best we must not reject an extremist, and that a mere moderate, or a traditional liberal or conservative, cannot be a brilliant or otherwise exceptional person who would be a praiseworthy addition to the Court.

Judge Bork's proponents also remind us that traditionally it has been proper to consider a nominee's general theories, but improper to ask how he would vote on a specific matter. We will address this later.

Then there is "judicial restraint" and "original intention", discussed earlier (but rarely mentioned by Judge Bork's heavyweights, who in our opinion regard this as one of the "crude legal notions emanating from the A.G.'s office", discussed earlier).

Any law-school student who has completed his introductory Constitutional Law course should be able to answer all but questions 4, 13, and 14 (regarding the nature of the federal court's "judicial power", the people's rights retained under the 9th Amendment, and the states' and people's powers reserved under the 10th Amendment) of the 15 questions we directed earlier to original-text proponents. The student may have answers, but they will be mostly guesses, for questions 4, 13, and 14. If they can partly answer question 4 (regarding "judicial power"), we commend them because it will reflect some familiarity with English common law and England's legal and political history.

The student's answers to several of the other questions will, however, demonstrate that until roughly the second half of this century, the Supreme Court has usually been conservative, and that judicial "activism" has come primarily from conservative courts.*/

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*/ If Americans accept Judge Bork's majoritarian concept of judicial restraint--that the Court should normally defer to the majority's will as expressed through legislatures--they must condemn the 20th Century pre-1937 conservative Court for invalidating all those statutes by Congress and state legislatures, and they must applaud the post-1937 more liberal Court for not invalidating such statutes, including the Social Security Act and the various pro-labor and pro-civil-rights statutes.

Most activism by a liberal Court was in the 1950's-1970's, (Cont'd)

Thus at least when applying Judge Bork's majoritarian theory (the apparent setting for most current discussions of "judicial restraint"), people have short and mistaken memories about which Courts were restrained and which were activist.

Judge Bork

Prior to the commencement of the hearings, we drafted preliminary analyses of Judge Bork's views, opinions, and court decisions. We then realized, however, that such analyses have already been drafted, to an impressive and even appalling extent, by many other groups--some supporting and some opposing the nomination.

It is unlikely that our detailed analyses would provide either fresh information or fresh insights. We therefore have chosen to state only, or primarily, our conclusions. Substantiation for these conclusions is available from others' works that have been submitted to the Senate and the press. We urge study of the compilations (including the White House's, which cites as many decisions as most other compilations). We also urge publication of their highlights or details, by the press.

Our conclusions follow:

--Judicial Restraint, as "Original Intention"

This has been discussed above, and by others. The "original intention" (or "interpretivism") theory is too simplistic, and does not work. But traditional "judicial restraint"--in the sense of moving carefully and judiciously, and giving earnest consideration to precedent--remains as valid a concept as ever.

--Emphasis on Theory

This is perhaps the most complex, and perplexing, aspect of our review of an intelligent and complex man. A consistent theme in Judge Bork's works appears to be an almost obsessive need to develop intellectually respectable theories.

Our concern is not with a quest for such theories. This quest is shared by judges, professors, and lawyers in private firms. An intelligent person should push and develop his intellect--then exercise it, when appropriate, in developing theories. (We think it is incidental and irrelevant that, as a

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and dealt mostly with matters involving the privacy rights of individuals, criminal law, and various rights for blacks.

result of such efforts, one is or is not deemed to be "an intellectual".)

It does, or did, not seem to be irrelevant to Judge Bork. There seems to have been a quest for intellectual respectability as such, accompanying his quest for theories; this too, however, is a common and harmless affliction. Then, strangely, in recent years an anti-intellectual strain has appeared, as he has adopted the crude "original intention" theory and has derided persons who have "upper middle class values" and profess to see a moral basis in the law.

To most of us, "unprincipled" means to lack honesty and integrity. Judge Bork uses the term differently, adopting Professor Wechsler's concept of "neutral principles", under which a decision that is not based upon a general and neutral principle becomes "unprincipled"--especially, if we understand it correctly, if the decision reverses early Court decisions. We respect Professor Wechsler's work in constitutional law, and we can accept this terminology.

But we are perturbed by Judge Bork's emphasis on this and other theories--and the consequences of his emphasis. (Not incidentally, we should mention that Professor Wechsler regarded the abortion brief of the Solicitor General's office, in the 1985 era of Attorney General Meese, as "presumptuous" and "a mistake", because of the recent affirmation of the 1973 Roe v. Wade case and the fact that the membership of the Court had not changed. See The New Yorker article referred to in the footnote on page 35.)

--Power and Amorality

Since about 1971, when he was 44, Judge Bork's theories seem to reflect amorality*/ and to respect only power. The amorality seems to have arisen in large part from (i) Judge Bork's background of Chicago-school economic theory, with its stress on moral relativism, (ii) his infatuation with, and possible distortion of, Professor Wechsler's concepts of neutral principles, and (iii) his apparent obsession with theory, of one kind or another. The respect for power came perhaps, in part, from the above economic theory, and in part merely to fill the vacuum created by the amorality.

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*/ We will stress only once, but firmly, that we are not discussing Judge Bork's private views or actions. His private morality and tolerance have been demonstrated in his marriages and family life, and in his courageous stand against his law firm's earlier, but not present, anti-Semitism. We respect and envy his personal warmth and devotion, to both family and friends.

The foregoing discussion of causation is conjecture, and probably impertinent and presumptuous. We are confident, however, in our conclusions about the resulting emphasis on amorality and power. This emphasis is reflected in Judge Bork's theories, in his court decisions, or in both.

--Majoritarianism

This important theory by Judge Bork states in effect that since there is no basic, controlling set of moral values, individuals and courts should defer to the moral values of the then-existing majority, as expressed in statutes of legislatures. Hence "might", the will of the majority, makes "right". Not "right makes might", as Sophocles in effect said (see Appendix A, p.4).

The development of this concept was aided, of course, by first dismissing the Bill of Rights (as a "hastily drafted document upon which little thought was expended"--a now much-quoted statement), and then trivializing "rights" by defining them as competing claims to "gratification" (which is, incidentally, a very ambiguous word that can mean, for example, a reward or a gift or a payment). The trivializing helps enormously: if a right is merely a claim to gratification--perhaps something that, if you are very good or very lucky, the tooth-fairy may leave under your pillow--it becomes much easier, and more superficially "reasonable", to rid oneself of one's immature reverence for so-called "rights", and to accept that one's individual "rights" should be subordinated to the "rights" of a majority or the government.

The majoritarianism theory works in harness with original-intention, but probably is the more important of the two, in its usefulness in achieving consequences important to this Administration: a state legislature's acts are deemed to reflect the will, and moral values, of the majority in a state,*/ and because of the majoritarianism theory, must take precedence over the claims of "rights" by individuals. Then several things happen: since the 14th Amendment has also been derided by Judge Bork (as reflecting a mere "value choice" or "value impulse" of men who "had not even thought the matter through"), the 14th Amendment may not cause the 5th Amendment's protection of individuals' rights to be extended to state action. But if the 14th Amendment *does* protect individuals from state action, all is not lost: the original-intention theory can still limit the 14th Amendment's protection to only those rights explicitly enumerated in the Constitution's *text* (or, if more limiting, the rights that the framers *intended* to protect).

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*/ This concept may give one pause, in light of the frequent and disproportionate influence of (i) paid lobbyists, (ii) highly organized and vocal special-interest groups (from anywhere in the political and economic spectrums), and (iii) individually or collectively large campaign-contributors (again, from anywhere).

The juxtaposition of the above two theories leads, not strangely, to implementation of the President's social agenda. Abortion and privacy matters, school prayer, busing, affirmative action, and equal-representation--all can be addressed by state legislatures and, bowing to majoritarianism and original-intention, the federal courts must not be "activist". It is "reasonable", and works beautifully.

The theories are complemented, of course, by theories of others. When the Attorney General claims that any branch of government should interpret the Constitution and that the Supreme Court's interpretations are not the Supreme Law of the Land (see page 34), then it is not only the Justice Department, Solicitor General's office, and White House staff that may do the interpreting: so can the lower federal courts. In the Alabama *Jaffree* school-prayer case discussed above (see page 27), the federal district court judge had upheld all three versions of Alabama school-prayer statutes, and said that Alabama has the power to establish a state religion if it chooses to do so. (According to the profile of this judge, William Brevard Hand, in the 1986 *Almanac of the Federal Judiciary*, *The Wall Street Journal* issued a 1983 "editorial [that] praised Hand's decision in the school prayer case. The Journal said that Hand *had done the republic a service by issuing an unusual and controversial opinion*." (Emphasis ours.)

The Attorney General also complemented Judge Bork's (and his own) theories by complaining at an American Bar Association annual convention that an (activist) federal judiciary had entered into an area (abortion) "once clearly reserved, under our Constitution, for the states themselves to decide" (see question 14 on page 23, regarding the unspecified powers reserved by the 10th Amendment to the states or the people). The Attorney General thus divined not only that the "power" to make abortion decisions was reserved to the states instead of to the people, but also that such "power" was among those "powers" not enumerated in the 10th Amendment. (He had to focus upon "powers", because the 9th Amendment's reservation of "rights" applies only to those retained by "the people".)

The theories are also complemented, of course, by careful use of words and phrases that sound reasonable and eminently fair. The President tells us that Judge Bork "won't put his own opinion ahead of the law." The Committee will receive ample evidence to the contrary, based upon opponents' compilations we have reviewed. The New York Times noted on September 13 that "Judge Bork has complained that the "liberty" of the majority "is increasingly being denied" by the Court's "creation of new rights" for individuals, such as the right to privacy in intimate sexual and family matters." (Emphasis ours.)

That sounds reasonable, even admirable (although reminiscent of the Judge's concern for that oppressed minority comprising hotel and restaurant owners): we certainly do not want our courts denying the "liberty" of the majority by recognizing individuals' so-called rights to privacy.*/ It seems not important if the actual majority in a state opposes prohibiting abortions (see polls, and see footnote on page 46), but a strident minority gets an anti-abortion bill passed; the statute then becomes "the will" of a political "majority", to be condoned by the courts because the court must show "judicial restraint" and recognize the [probably actual] original intention of the state legislators. It also is not important if the actual majority does in fact support the legislation: the statute will be upheld under the majoritarian and original-intention theories, because there is no explicit right to privacy, let alone to have an abortion, in the Constitution--and we will not worry about those unspecified rights reserved to the people under the 9th Amendment, and we will not worry about what the Founding Fathers probably really thought about an individual's right to privacy.

Forgive our sarcasm: we are letting our annoyance start to show. But for more sarcasm: do not worry, corporations and other businesses--surely no local, county, or state majority (and no influential minority that succeeds in getting a statute or ordinance passed) would even think to impose harsh regulations or high taxes on you. And surely no local, county, or state executive or judicial official will, in his authorized personal interpretation of laws, make an arbitrary or capricious decision, because all of those deplorable decisions made under the Rule of Men, instead of the Rule of Law, are occurring only in Washington.

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*/ This theme was picked up in a Chicago Tribune editorial on August 16, which said that Judge Bork's opponents "are actually standing against the possibility of change, in this case in the direction of a more modest use of the court's power to resist the will of political majorities." (Emphasis ours.) That sounds "reasonable"--we all like moderation, and it sounds more palatable to talk about resisting our usually-esteemed majority rule than to talk, as our forebears did, about the occasional tyranny of the majority.

And if all else fails, we can let state legislatures interpret the Constitution, and declare the Supreme Law of the Land, at least as it applies to their states. There is ample precedent for that, in the Nullification doctrine. Remember the 1798 Kentucky Resolutions (drafted by Jefferson) and the 1799 Virginia Resolutions (drafted by Madison), decreeing in effect that the states could invalidate any federal acts that were not expressly authorized by the Constitution? (By today's standards, and by the standards of conservative Supreme Court "activism" during most of the last 200 years, those Founding Father heroes got carried away--but does not the nullification concept, stressing states' rights, arise inevitably from the interpretive rights, and majoritarian will, that are at the heart of the Attorney General's and Judge Bork's theories?) Later, Jefferson and Madison thought, and we have apparently mistakenly thought, that Marbury v. Madison in 1803 pretty much settled that issue, about who determines the Supreme Law of the Land.

But South Carolina in the pre-Civil War period, and the Attorney General today, seem to have reached a different conclusion. (South Carolina "nullified", or declared unconstitutional, a couple of Congressional statutes).

We have digressed, however. The nullification concept clearly complements Judge Bork's theories, but with respect to interference by Congress with Presidential actions he achieves the same result by different theories.

--Separation of Powers

An astonishing transformation occurs: when the subject changes to federal legislation (instead of the state legislation that may permit the Administration's social agenda to be enacted in various states), the theory of majoritarianism usually takes a well-earned rest. (But beware, corporate clients, that such "rest" is merely what is happening now, in practice; in theory, and in future practice, there is no reason why majoritarianism will not be applied as much to Congressional action as to state action, to prohibit intervention by courts.)

At the federal level, a principal operative theory is, in one form or another, separation of powers--and the President's actual or implied or "inherent" powers.

On the pocket veto (Barnes v. Kline in 1985), the separation of powers doctrine, combined with lack of standing to sue, seemed to suffice. Separation of powers also justified Judge Bork's 1978 testimony against a statute that required a warrant from a special court to authorize executive wire-taps, and his opposition to an independent special prosecutor to investigate executive action. The President's "inherent" and foreign policy powers seemed to justify Judge Bork's rebuffing Congress on the Cambodia incursion. The views of Judge Bork in the wire-tap, Cambodia, and *Abourezk* matters (foreign affairs powers of the President) seem, especially, to remind one of the Personal-Government problems arising in the Iran-Contra affair.

Judge Bork forgets that Alexis de Tocqueville's comment on our courts is about legislatures but applies equally to executive acts: "The power vested in the American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers that have ever been devised against the tyranny of political assemblies." Members of Congress keep an eye on each other. The Court, as well as Congress, must keep an eye on the President--any President.

--Predictability of Judge Bork's Decisions

We are confident that others will address such issues as affirmative action and equal representation, and that they will focus on a disturbing conclusion: that it seems to be easier to predict Judge Bork's court decisions by knowing the identity of the parties than by knowing his theories.

We shall leave to others, however, to explain the statistics and niceties of Judge Bork's rulings on standing-to-sue, and the apparent predictability, in his decisions, of victories of government over the individual, business over governmental regulation, and the President over Congress and the judiciary.

--Rights of the Individual

On free speech, most of us like to think that we start from 100% freedom, and then back off only as truly required. We acknowledge that we lack *absolute* freedom of speech, because the clear-and-present-danger exception both is reasonable and "feels" right. But we expect maximum freedom of speech, with as few limitations as possible.

To us, it is incidental that freedom of speech exists in the Constitution as an unqualified, explicit right that cannot be abridged by government; this freedom is one that, viscerally, Americans assume is our natural right, regardless of whether it appears in our Constitution. But here, curiously, we are willing to accept something less than that to which we are expressly entitled under the Constitution; but only if the restrictions are limited and fair--if they pass the Traffic-Court test.

Judge Bork approaches it from the other direction, starting with political speech and, more recently, evidently adding scientific and moral speech. Where does that leave us: 30% of most speech is permissible? 70%? Americans prefer the 100%, in the text of the Constitution, minus the clear-and-present danger restriction imposed by judicial "activism", and minus also whatever minimal and reasonable restrictions are appropriate for the sensitive areas of (i) literature and photographs for youths, and (ii) pornography. Are we missing anything?

Many of us have read Mill's Essay on Liberty, which includes not only his renowned "If all mankind minus one, were of one opinion..." passage, but also his "We can never be sure that the opinion we are endeavoring to stifle is a false opinion; and if we were sure, stifling it would be an evil still." That made sense to us then, and it still does. At least we do not have a government that requires us to listen; we can decide that a person is wrong, or even deranged--and merely walk away.

As to privacy, most Americans think that our homes are our castles. Again, we accept reasonable restrictions. If a policeman can get a warrant from a prudent judge, or if he is in hot pursuit of a person he has seen commit a crime, or if he got a call from neighbors complaining that our raucous party is keeping them awake--these are reasonable restrictions, that also pass the Traffic-Court test.

But apart from reasonable restrictions, why are people arguing? What has happened to the concept of "mind your own business"? Do we, as a minority or majority, really want to push something through Congress or our state legislature that intrudes into somebody else's private life? Are we that sure that another minority or majority will not come along and intrude into our lives? We had better first apply the Traffic-Court test to ourselves. And if we fail it, we better hope that a court will itself apply the test.

In short, did we need the Court to tell us we have a right to privacy? (Granted, it had to, because the "will of the majority" had been abused.) But do we want a Judge Bork to trivialize and ridicule our right to privacy and other rights, and to enunciate and invoke "reasonable" theories that let us trample on each other?

--The Missing Chromosome

This may, in the end, be the problem with Judge Bork, and with too many Americans.

What is missing in all of Judge Bork's writings is the simple, inelegant concept that Individuals, and their rights, are important. That America was and remains animated by its Individuals and their rights. And that those rights are the only fortress for our Liberty.

A September 17 Chicago Tribune column by Stephen Chapman*/ states that "Bork's stress on majority rule neglects the other crucial purpose of the framers: to put a host of individual liberties beyond the majority's reach." (Emphasis ours.) The foregoing says better what we already have said.

What caught our eye was Chapman's paragraph about a Harvard fellow who transforms words into a photograph:

> "Bork's errors are ones of emphasis. But in interpreting the Constitution, emphasis is everything. As Harvard political scientist Stephen Macedo puts it, Bork sees individual rights as islands in a sea of government powers, instead of seeing government powers as islands in a sea of individual rights." (Emphasis ours.)

The other element missing in Judge Bork's writings is another simple, inelegant concept: Justice. "EQUAL JUSTICE UNDER LAW" is inscribed on the Supreme Court Building. Inscribed on the Justice Department building are about eighteen quotations; eight mention Justice, like "JUSTICE TO EACH IS THE GOOD OF ALL", but many do not, like "WHERE LAW ENDS, TYRANNY BEGINS".

Justice is a tough word to talk about without sounding sanctimonious. It is too abstract, and invites cerebral posturing and deception. That is why we endorsed the Traffic-Court definition of Justice: test Reasonable with the mind, but test Fair, Impartial, and Consistent viscerally. Yes, it is crude and unsophisticated, but we do not trust ourselves, or others, to adorn it with verbal garlands.

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*/ Chapman says that if Judge Bork had been on the Court over the last few decades, "some Supreme Court mistakes could have been avoided--notably on abortion and affirmative action. But on balance, the Constitution would be a far feebler document than it is today, and the freedom of Americans would be perceptibly less."

Except for certain of his comments during the Senate hearings, we find no evidence in his writings that Justice, any more than the Individual, is of consequence. Justice, that is, as most of the finer past and present Supreme Court Justices define it. Justice Powell understood this, when he said simply and humbly that he just tries to do justice in each case. Judge Bork seems to think that Justice will result from the proper application of proper theories. That will not do.

Judge Bork fails to realize how well-developed the American sense of Justice and fairness is. He objected to certain earlier civil-rights legislation because, in part, he was concerned about the dissension and turmoil it would cause (a concern he evidently has not expressed about enactment of the social agenda). He failed to appreciate the distinctions that Americans can draw, based upon their visceral sense of fairness (and perhaps, in the case of civil rights for blacks, a degree of shame and embarassment). For example, Americans seem to believe, and we agree, that violence and destruction by rioting blacks should be dealt with no differently, or less vigorously, than the same acts by whites.

But after the Supreme Court invalidated school desegregation in May of 1954, 54% of American adults said in a July 1954 Gallup Poll that they approved of the Court's decision. (41% disapproved.) This was a mere two months after the decision, when tensions presumably would still be severe. Similarly, the majority seems to have accepted black voting rights, particularly since Congressional action followed so shortly after Americans watched on television the violent reaction to peaceful black marchers in Alabama. (We read that an incoming Congressman is a black whose skull was fractured on the bridge at Selma We are uncertain that we, in his position, could exhibit the tolerance and restraint that he and other blacks have displayed.

Americans have recognized that on such basic matters as education, voting, and job opportunities (if not on al affirmation action programs), it is simply fair, and right, to do what has been done since World War II by all prior Presidents, and by the Supreme Court.

When most Americans can demonstrate a high respect for fairness and justice, we should not accept less from a Supreme Court Justice.

--The Biggest Concern--

As may have become clear, our objection is to more than Judge Bork. Let this President or any President nominate a traditional moderate, liberal, or conservative. But each President should also respect the Rule of Law, and select a nominee who (i) respects the Rule of Law and the rights and powers of the separate branches of government, (ii) recognizes and respects, intellectually or viscerally, the fundamental importance of individuals, and individual rights, in our political system, (iii) is judicious, tolerant, and temperate, (iv) respects, not ridicules, the judicial precedents established by prior, often brilliant, Supreme Court Justices, and (v) is aware that the Supreme Court should, though less than the other branches, be somewhat attuned to Americans' needs and expectations.

Implicit in the above criteria for Justices is a concept that perhaps should be explicit: an essential aspect of our political and legal heritage is that such heritage does, in fact, include a sense of morality, that there is a difference between right and wrong. We cannot define it well, and we do not even understand it well. It may be partly intellectual and partly visceral. It may arise in large part from our religious views, but certainly not from only one religion's views. Just as the Golden Rule is a concept echoed in many religions -- and is a sound principle for persons, businesses, and governments -- this broad sense of morality is what we seek in our Supreme Court Justices and all other leaders.

The solution to lack of Presidential restraint is not lack of restraint by the Senate, but lack of the somewhat traditional forbearance--failing to press vigorously to determine nominees' views. This can be done, in part, by insisting upon hearing a nominee's views of past decisions; this should preserve the technical nicety of not asking a nominee to commit himself on future cases.

(A recent CBS-New York Times poll indicates that 70% of Americans favor having the Senate select Supreme Court Justices. Perhaps, ultimately, that is what America will choose.)

We are likely, however, to remain with the present nomination-and-confirmation mechanics for the foreseeable future. And that brings us to a depressing conclusion we finally reached, one that explains if not justifies this interminable Statement.

Our initial inquiry was solely about Judge Bork. We then realized, however, that Judge Bork was nominated primarily for his commitment to the President's social agenda. Then the difficult part: we would not be worrying about a trivial "social agenda" unless (i) one segment of the population insisted upon it, continuously, vociferously, and sometimes violently, and (ii) the Silent Majority remained silent.

Earlier in this Statement, we urged the President to help unite us, not divide us. But he cannot do it alone, and that is a good thing: unity imposed from above is just another word for Order, or Repression. In America, if we want to retain what we have, unity must come from Liberty: from most of us choosing unity, and working at it.

The remainder of this Statement will consist of brief comments or reflections from within our group.

--The Easy Answers

"We are always told by a politician or other leader that he has the answers. He always sounds sincere, is often fervent, and is sometimes angry. But he's got the answers. Every once in a while he does. But how often? It made me look up the definition of "demagogue", and my Webster's Collegiate told me that he's "a speaker who seeks to make capital of social discontent and gain political influence." That's the kind of leader I hear too much--the one who caters to the worst in us."

1. Crime.

"Our courts are a mess, both in criminal and civil cases. Long delays and postponements, with lawyers often jousting excessively and judges permitting it. On violent crimes and dope peddling, most of us have to delete expletives: we want those people taken off the streets. But we're not going to resolve this easily. For years we've elected politicians who promise to "be tough on criminals", and who will uphold "law and order". Do we see less crime, or fewer criminals turned loose, than 10 or 20 years ago? And we've had an increasingly conservative Supreme Court for 10 or 15 years. Has crime decreased?

"We don't want to pay the bills for the tough answers: build more jails and hire more judges, so courts won't have to accept so much plea-bargaining, and then insist that judges get tougher about not permitting so many postponements (when witnesses may become unavailable). And pay for more drug-enforcement officers to reduce the smuggling of drugs to which people become addicted--the addicts often commit crimes to pay for their drugs.

"And we don't want to pay for pre-school help and learning, or for day-care nurseries so mothers can work, or for better education, or for job training--to make it more likely that a ghetto youth can become a wage-earning taxpayer instead of a roving gang-member. All of this is probably money well spent, in the long run--crime is expensive, prisons are expensive, and the inmates aren't paying taxes--but are we willing to pay the bill?

"Of course we can take a closer look at the outer edges of court criminal decisions, to see if anything should be rolled back. But watch out for the basics: most rights of an accused aren't judge-made--they're in the Constitution--and for a good reason. Anybody who applauds himself as "law-abiding" should take a hard look at the Constitution, and decide which of those rights he wants to give up.

"The Constitutional protections are, except for cruel and inhuman punishment, rights not of "criminals" but of persons accused of crime--for the simple reason that it was hard to draw a line between truly civil crimes and crimes that were political (like "disagreeing" with government) or religious (like Galileo's saying the earth revolved around the sun or, in America in this century, teaching evolution or getting an abortion). And who knows what could become a crime tomorrow, if the morality of a majority is to be imposed?"

2. Communism.

"This subject is also a demagogue's favorite. Remember the McCarthy witch-hunting of the early 1950's? Did anybody get caught that wouldn't have been caught by the FBI? Maybe, but I can't remember any.

"The effective people against Communism in the late 1940's and early 1950's were men like Senator Hubert Humphrey, and especially George Meany and Walter Reuther and most American unions. Union members should, in Marxist theory, be perfect candidates for conversion, but American workers already knew that they had more to lose than to gain from Communism--they knew that "a Communist is one who has nothing, and is eager to share it with others."

"And Americans were more sensible than their lawyers: the 1955 Britannica Book of the Year states that in August of 1954, the American Bar Association rejected a proposal that "to effectively combat Communism, Americans need to have an understanding of what it is about. Later in the same month, a nationwide Gallup Poll found that 67% of American adults said they would favor the teaching of the facts about Communism in all public schools.

"So far, we have beaten the Communists at their own game. There is nothing wrong with "from each according to his ability"--and we have helped people develop their abilities, and have given them ample opportunity to use them. On the remainder of the quotation, "to each according to his needs", we have been relatively generous in helping the needy, but we've added an entire extra dimension: to each also according to his individual efforts. Bakunin, one Russian theorist, said that in a democracy "a privileged minority stands against the vast enslaved majority." Which country does that describe today: America, or Russia?

"Lenin worries me more. In 1917, he said:

> "A democracy is a state which recognizes the subjection of the minority to the majority; that is, an organization for the systematic use of violence by one class against the other, by one part of the population against another."

That statement has usually been wrong, as a description of America. But it's not entirely wrong now, and (regarding blacks) was often true. We discussed earlier both the existing and the possible consequences of the President's social agenda, and quoted Neikirk's warning about our loss of a sense of community. Lenin would applaud the dissension America's demagogues have been nourishing.

"Let's keep watching Russia like a hawk but, to the extent sensible and safe, also like a dove. If we can defuse tensions, reduce somewhat our huge military expenditures (and the waste we keep reading about), and achieve at least partial disarmament with adequate safeguards, let's do it."

--Politics Can Work

"Our system can often work well, when our politicans listen to their constituents. Perhaps it is too recent for its impact to be appreciated, but the recent tax reform act is a notable example, and is described in a recent book, Showdown at Gucci Gulch, by Jeffrey Birnbaum and Alan Murray, two Wall Street Journal writers.

"Most in our group recall being told by our tax colleagues, and the press, that the reform legislation would never pass. The statute died, and was reborn, about six times. The politics were as partisan as ever.

"But Senator Bradley and others came up with a compromise that satisfied conservatives by lowering tax rates, and liberals by deleting loopholes. President Reagan, Congressman Rostenkowski, Senator Packwood, and others eventually supported the bill. We are told that Congress simply felt shame, about the existing tax laws, and knew what the people wanted and would accept. So to the surprise of most experts, the statute passed. A remarkable, political achievement.

"If we and Congress and the President did it once, on taxes, we can do it again, on other issues."

--The Decision in 1787

"Two of the political theorists known to the Founding Fathers were Thomas Hobbes and John Locke. Hobbes felt that men, in a state of nature, were selfish and brutish, and formed a society to protect themselves from their own anarchy. But in such society they agreed to the absolute sovereignty of a leader, whom they could disobey only through revolution.

"Locke felt that men were good, and formed a society only to protect their natural rights and independence, and to act through a consensus (which, incidentally, means "to feel together").

"Our forebears chose Locke, but some of them were concerned about our base instincts as well as our good instincts. Hamilton's crystal ball, envisioning a prosperous, industrial nation, was better than Jefferson's, who assumed that we would remain a basically agrarian nation of self-sufficient, independent, educated persons. Jefferson feared cities, with their poverty and tensions.

"We have our farmers, the most productive and efficient in the world. And we have our towns and cities, with their industry that has given America its growth and prosperity--but also much of its poverty and tensions.

"We have severe domestic problems, and we must work at them. What Kipling said of England has even more salience in heterogenous America, as we celebrate our Constitution:

> "Our England is a garden and
> such gardens are not made
> By singing: -- "Oh, how beautiful"
> and sitting in the shade."

"Our task in living peaceably together is complex and difficult. To succeed at it, we have to recognize each other's fundamental rights and insist that our leaders obey the Rule of Law. But if our system is to survive, our leaders can only lead. The rest is up to us."

9/23/87

APPENDIX A, TO STATEMENT BY LAWYERS FOR THE JUDICIARY

Our Constitution's Ancestry */

To put yourself in the 1780's world of the drafters of the Constitution, it is best to do just that: Forget the 19th and 20th Centuries, and our cars, trucks, railroads, planes, and space shuttles. Our power from oil, gas, electricity, and uranium. Our huge cities, factories, corporations, and unions. Our machine-made products, and our plastics and other synthetics. Our steel, aluminum, and reinforced concrete. Our ballpoint pens, typewriters, and computers. And our radios, telephones, and television. In short, forget most of what you see inside and outside your home and your work-place.

Instead, you are Thomas Jefferson, in 1787. Twelve years ago at the request of your colleagues on a congressional committee, you wrote the Declaration of Independence. You (who will be our 3rd President) are in Paris, as America's envoy to France. John Adams (who will be our 2nd President) serves as our envoy in London. Paris has about 500,000 people, London 800,000, and New York 60,000; Italy 17,000,000, America 4,000,000. Washington, D.C., which you help design, will be founded in two years.

Power for America's agriculture and limited industry comes from men, women, animals, wind, and water.

When you travel, it is by foot, horseback, or sailing ship; but the French invented the bicycle eight years ago, and Convention delegates saw the launching this year of a boat driven by steam. (This steam power will help America's phenomenal industrial growth, and its expansion westward with railroads.)

When you converse, it is in person or by letter. When you write (by candle or oil lamp, but fairly soon by gaslight), it is with a quill pen, which must constantly be dipped in your inkwell

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*/ We will include various facts, events, and ideas that we believe are relevant to an understanding of the 1780's and the framing of the Constitution. Our summary will, of course, be incomplete. We do not discuss St. Thomas Aquinas, or hundreds of other significant persons; or William the Conqueror's invasion of England, or thousands of other significant events. We invite others to contribute their own historical facts, events, and ideas.

and sharpened; this will change with wider use of the "fountain pen" invented seven years ago--the same year, 1780, that two London newspapers began a somewhat unseemly practice: to publish on Sunday

You are 44, the son of a Virginia planter. You are (we are told by Encyclopaedia Britannica) tall and large-boned; slim but sinewy; your carriage is graceful, but somewhat loose and undignified. Like most of those at the Constitutional Convention in Philadelphia, whom you have influenced but cannot join, you are affluent (some others are merely well off) and a well-educated, white anglo-saxon Protestant. You are a lawyer, and a plantation owner.

Your other serious interests include mathematics and science. It is said that you are "an extraordinarily learned man", a man with "qualities of personal and intellectual distinction" that set you apart from even "the extraordinary group of statesmen from other sections of the country" with whom you have become associated. You know Italian, Spanish, French, Greek and Latin. You invariably are temperate and courteous.

You are also an architect. Fifteen years ago your slaves completed their construction of your house, Monticello, an early-American example of the revival of classic Greek and Roman architecture. You often have 20-50 guests; each stays a day, a week, or longer.

In preparing the Statement and this Appendix, we relied heavily upon several series of books published by Encyclopaedia Britannica: Encyclopaedia Britannica itself, the Britannica Book of the Year series, and the works edited by Mortimer Adler: The Great Books (which includes America's basic Constitutional documents and The Federalist papers), Gateway to the Great Books (which includes the 1689 English Bill of Rights and the 1776 Virginia Declaration of Rights, probably the two principal antecedents of our Constitution's Bill of Rights), and The Great Ideas Program. We also refreshed our memories, or often simply learned, by consulting the Bible and numerous books by such persons as Samuel Eliot Morison, Adrienne Koch, Oliver Wendell Holmes, John P. Frank, Edward S. Corwin, Daniel J. Boorstin, Richard Hofstadter, R. R. Palmer, Frederick Lewis Allen, and Will and Ariel Durant. As we mentioned in the Statement itself, we also found useful The Timetables of History. The use of excerpts or information from any of the above sources is subject to the copyrights of the respective publishers, and does not imply an endorsement by any such publisher, editor, or author.

(You will also design the buildings and curriculum for the University of Virginia. You are spared the knowledge that, after World War II, America will convert to look-alike cities of sterile glass-boxes, built by architects who until the 1980's will say it is "bourgeois" to use color, warmth, ornamentation, and hand-craftsmanship, and who scorn natural materials like wood and stone. These architects, like you with your more stately and elegant Monticello, failed to express the variety and individuality of America. But we console ourselves: the rigid conformity among modern architects was self-imposed, not government-imposed.)

Perhaps you have heard the works of young Mozart, or the much younger Beethoven whose first works were printed four years ago. You dance the fashionable minuet and quadrille and, perhaps, the latest fad from Vienna, the waltz (but not the Polish polkas, the Irish jig, and the American square dance--the lively and exuberant dances that will reflect the vitality of a more diversified America--or the several Latin dances that Americans later will enjoy).

You hear the moving spirituals of America's involuntary immigrants (but not the melodic and jubilant jazz, a distinctively American music, they are later to give to us. You also lack today's favorite songs and music from men with names like Gershwin, Rodgers and Hart, and Rodgers and Hammerstein, and wonderful patriotic songs from Irving Berlin.)

Your cuisine, back in America, is good but bland. (Today in a more heterogeneous nation, Americans eat food called "Italian", "German", "French", "Greek", "Irish", "Swedish", "Spanish", "Mexican", "Polish", "Soul", "Chinese", "Japanese", etc.--and Americans are glad to have them all.)

Yours has been a traditional and continuing liberal education, enjoyed by affluent American conservatives, as well as liberals, among the Founders. What this liberal education means, as you so amptly and aptly demonstrate, is that you individually learn, and question and analyze, what your contemporaries and predecessors have thought, written, and done. (You and many Founding Fathers were better educated than are many lawyers, businessmen, and others today.)

--Greece--

You know your Greeks and Romans, through the "classic" literature (that since World War II has received less emphasis). You learned of the Greek word "democracy", meaning "power of the people", and its underlying principle of government by the people as a whole, not by one person, group, or class.

You also learned of the tensions between "city-states", and between city-states and any attempted central government. You have read Plato's Republic (and will re-read it again, in Greek, at age 71), which said that "Democracy is a charming form of government, full of variety and disorder, and dispensing a kind of equality to equals and unequals alike". And Sophocles, who said over 2,000 years ago: "In a really just cause, the weak conquer the strong."

In the works of Plato and Xenophon, you read of Socrates (whose questioning-and-refuting method is still used in law schools today), who instilled in youth the spirit of inquiry, which might lead not only to knowledge, but to "justice"--and who was forced to drink hemlock by Athenian reactionaries who feared new ideas. (Today, Americans are proud, not fearful, when their children display "inquiring minds".)

You learned also, from Aristotle's Politics (a book that even today warrants its bulk on our shelves), an important idea: Revolutions break out when the only classes are the rich and the poor, and "the best political community is formed by citizens of the middle class. Those States are likely to be well administered in which the middle class is large, and larger if possible than both the other classes, or at any rate than either singly; for the addition of the middle class turns the scale and prevents either of the extremes from being dominant." (This idea is one that our sons and daughters, deriding us as "middle-class" in the late 1960's, did not yet understand, and one that Russia's leaders may never understand.)

Aristotle's Politics also noted, succinctly: "Even when laws have been written down, they ought not always to remain unaltered."

Many will be surprised to learn that you will, in the early years after 1787, advise a narrow interpretation of the Constitution, to preserve the people's liberties; they will be less surprised, though perhaps discomfited, to learn that Hamilton will espouse a broad and flexible interpretation, as essential for an effective national government.

In later years you will lose none of your passion for liberty, but will soon agree on the need for a stronger central government. You will adopt Aristotle's stance on flexibility of laws, when you say:

> "Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the

> preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country . . . But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times."

Sidney Smith, an English clergyman who soon will support the oppressed, and ardently attack English laws denying religious toleration for Catholics, will say in 1807: "When I hear any man talk of an unalterable law, the only effect it produces upon me is to convince me that he is an unalterable fool." Strong rhetoric, but from a man whose good works may have earned him the right to say it.

--Rome--

You studied Julius Caesar, the populist leader and his--and the Roman Senate's and the Roman Empire's--rise and fall. More recently, you may have been aided by the publication, begun in 1776 and completed this year, of Gibbon's Decline and Fall of the Roman Empire. You learned of the republican form of representative government as an alternative to direct democratic government, and decide that with 4,000,000 people the representative form is necessary for America.

The Greek gods were often animistic: derived from the spirit or vitality of natural objects like the sun or earth. Their gods also combined folk heroes and deities, and included gods of this world and of the underworld. The Romans chose many of the same gods, but added and ultimately emphasized cult-worship, then emperor-worship. This last development proved too meaningless and spiritually unsupportive, to all but the upper classes; so Judaism and Christianity were embraced by increasing numbers of persons.

--The Bible--

You still read the Bible. That is a personal and private matter, so few persons know which verses or Books you find most meaningful. It is likely that you (like many of us later) find sustenance both in the Gospels and in the life of Jesus, who chose to live among the lowly and oppressed, who denounced the intolerance and hypocrisy of the Pharisees and scribes in their strict construction of the letter of Mosaic law, and who was sentenced to death for blasphemy--a sentence not stayed by the Roman government, which declined to brave the outcries of a segment of the public.

In reaching your conclusions on strict construction (quoted earlier), religious intolerance, and the tyranny of majorities and minorities, such knowledge of the Bible may have given you useful political insights.

Your statement on another appropriate political influence of religion on politics is pithy: "The God that gave us life, gave us liberty at the same time." You incorporated this fundamental concept 11 years ago, when you drafted the Declaration of Independence.

THE DARK SIDE:

--Middle Ages--

You learned that after the fall of the Rome Empire came the thousand years of the Dark Ages and Middle Ages, until the late 15th Century when the Renaissance flourished--and when an Italian, subsidized by Spaniards, became America's first immigrant, albeit a temporary one. In this era you found Chaucer, Dante, and St. Thomas Aquinas. And, of enormous political and religious interest: the developing Holy Roman Empire--an alliance of monarchs and the Catholic Church. This alliance has been perhaps the most continuously powerful temporal and religious force in Europe, but soon will cease to be a political-military force when Napoleon causes its dissolution in 1806 (although the Church itself will not formally relinquish temporal authority, as to lands other than Vatican City, until the Lateran Treaty of 1929).

As you looked back in Western history, you saw both darkness and light. From about 1100 to 1300, the West pursued its Crusades, which produced lasting consequences that both benefitted and lacerated the world. In 1095, Pope Urban II exhorted Christians to march on Islam. To recover Jerusalem and the Holy Land. He gave them crosses, the Crusader's emblem; you knew from your Latin that "crusade" is from the Latin "crux", or cross. Militarily, the Crusades were only partly-mitigated disasters; the West obtained access to the Holy Lands, but not dominion over them.

The Crusades ultimately stimulated trade between the West and the Near East, spurred the substitution of money for barter, and enhanced banking techniques. The West gained both "chivalry" and, from the East, valuable and extensive mathematical, literary, navigational, geographical, and scientific knowledge: the scholarship and light in the Dark Ages was that of the Moors, Moslems, and Jews, not the European ancestors of most of us. This transfer of knowledge and intellectual leadership to the West went notably to Italy, and would soon foster the birth of the Renaissance.

The West and the Moslems paid a high price. The rabble of French and German peasants in the first wave of the First Crusade slaughtered thousands of Jews. The Fourth Crusade, in 1202-04, sacked a Christian city in Hungary, and thereby earned and received papal condemnation; the same Crusade then slaughtered Moslems and looted and destroyed Constantinople--and with it the Byzantine Empire. Near the end, in the Children's Crusade in 1212, many of the French youth found themselves sold into slavery, by ship captains, and most in the German group's journey died of disease and malnutrition.

Previously, Moslems had been relatively tolerant of their conquered Christians and Jews. The Crusades diminished that tolerance, perhaps permanently (as Western hostages know today). Worse, the ravaging Crusaders were a reminder of the second meaning of the Latin "crux": to torture, to "crucify". The West gained the stain of religious intolerance.

--Intolerance--

In 1229, the Church's Inquisition in Toulouse, France, forbade Bible reading by all laymen. The Inquisition began formally in 1233, when the Pope asked the Dominicans (an order founded in 1215, the year of the Magna Carta), to investigate the Albigenses, a sect in southern France. About 1252, the Inquisition began to use instruments of torture.

Torture and imprisonment have been common punishments; burnings, rare. You learned that less than 300 years ago, Torquemada and the Spanish Inquisition, the cruelest and most intrusive of Europe's Inquisitions, initiated rigorous thought-control and tortured and punished individuals who were "insincere", and drove 800,000 Jews from Spain. The learning and culture of Moorish Spain had been a bright spot in the Dark Ages; now (and in 1987) advancements in science, industry, literature, and the arts seem to come more from Northern Europe and England (and, in the 19th and 20th Centuries, will come also from America). The Inquisition in France was not banned until 1772, four years before you drafted our Declaration of Independence, (and will not be banned in the Papal States until the 19th Century).

In the 1780's, this intolerance is not merely a distant memory. Even today, as you in Paris observe events around you, all political power in Europe lies with monarchs and the Church--all displaying keen interest in what an individual says or does, or even thinks. In this decade, the decade of the Constitution, Pope Pius XVI has tried without success to persuade Joseph II, Emperor of the Holy Roman Empire, to rescind Joseph's decree establishing religious tolerance, and freedom of the press. Joseph is one of the few "enlightened despots" or "benevolent despots" available for study by you; another is Prussia's Frederick William II, and soon another will be Catherine the Great.

Joseph has, with only modest success, tried to make free land available to the poor--a privilege Americans have taken for themselves, and through their government, in settling America. Further, he seeks to abolish slavery, to humanize criminal law, to end judicial torture, and to establish two levels for judicial appeals. He also seeks educational reform, and to provide free food and medical care for the indigent.

Only a century ago, the Church's Inquisition forced Galileo, the inventor of the astronomical telescope (and a principal forefather of modern science), to recant his assertion that the earth revolves around the sun. You and the other Founding Fathers know that charges of "blasphemy" and "heresy" often are unrelated to what you regard as religious matters.

You know that religious intolerance has by no means been limited to Catholicism. Only two centuries ago, England's Henry VIII renounced allegiance to the Catholic Church and established himself as the head of a new church, the Church of England. Restrictions were imposed on civil liberties of Catholics. Most such restrictions will be removed in four years, in 1791, for those who affirm their loyalty (and most others will be removed in the 19th Century, but even in the 20th Century no Catholic may ascend to the throne or to certain high political offices).

You and our other Founders have also known religious zealotry in America, by Protestants: the Puritans were famous for their "witch-hunts"; and their speech and behavior were rigidly controlled, in obedience to their ministers' strict interpretation of the Bible. (America will be plagued again by certain of its religious leaders--each exhorting his followers not only to adhere to their particular religion's views, but also to impose such views upon others.)

--France--

France, where you stay, is fermenting. King Louis XVI is well-meaning, but a "shy" and "stupid" person who prefers hunting to ruling. He is not unpopular, but Queen Antoinette's carousing offends the people. And aid to America, in the colonies' revolution against France's enemy, has depleted the French treasury.

It will be two years, before the French storm the Bastille and issue their Declaration of the Rights of Man, igniting the French Revolution, a true revolution of have-nots. And three years, before French Jews are granted civil liberties. And six years, before 1793 when the French will execute King Louis XVI and Marie Antoinette, among the first of thousands to be executed by Dr. Guillotin's "humane" invention; in the same year the French will begin compulsory public education--a dangerous practice that will permit persons to learn, and perhaps even to question, and perhaps even to think for themselves. You regard education as pivotal, to America's experiment with democracy--that only educated, independent persons can make democracy work And soon, in 1795, still another dangerous practice will be introduced in France: freedom of worship. You and the other Founding Fathers know too much of religious intolerance--and the divisiveness it fosters and the religious "crimes" it engenders--to permit anything but freedom of religion, and even of lack of religion, in America.

You were born only 28 years after the death of France's and Europe's longest-reigning monarch, King Louis XIV, who lived from 1638 to 1715. You visit Versailles, and its magnificent gardens and Petit Trianon and Antoinette's "cottage" (and probably acknowledge, as do we, that without the monarchs' and Churches' splendid palaces and mansions and churches--using Moslem and Moorish techniques, gained from the Crusades, for heavy-masonry construction--the West's landscape would be dull). You admire the strides taken by Louis in promoting commerce and industry, and in developing a civil service to replace nobles for government administration. You find less to admire in his suppression of domestic criticism, and his revocation of the century-old edict of religious tolerance for the Huguenots.

You note also, however, that Louis was Europe's most famed, absolute monarch, the "Sun King" who best scorned the Rule of Law with his apocryphal "L'etat, c'est moi!": "I am the State!"

Thus you have seen, from the early Dark Ages to your present days in Paris, the mostly dark side of the West's history. Incessant wars that have been (and in the 20th Century remain) a staple of life: civil wars, and wars between provinces or factions or kingdoms.

An almost continuous trend has been the dominance of Authority and Order and Repression over the Individual and Liberty. And the supremacy of Personal Government, not the Rule of Law.

THE LIGHT SIDE

--Magna Carta--

But you also saw the light side: the faltering rise of the Individual, and of the Rule of Law. You and most other Founding Fathers know that the Dark Ages witnessed another political event (an event whose vitality remains unimpaired in the late 20th Century): the signing by England's King John in 1215, at the insistence of English barons, of the Magna Carta--the primary and most influential document in English constitutional history.

In 1213 (while the Children's Crusade marched southward through France, and Genghis Khan marched through China), significant events had occurred in England: King John submitted to the Pope's authority, thereby making England and Ireland papal fiefs; and the English precursor to Parliament was formed.

The original intention of the English barons, in compelling the King's signature, was limited and selfish: to obtain guaranties that despite papal influence their baronial privileges and feudal rights would not be violated. A startling concept injected was that the King could be compelled to recognize not only the barons' rights, but also certain rights and freedoms of English individuals and towns. The document's introduction proclaims: "TO ALL FREE MEN OF OUR KINGDOM, we have also granted, for us and our heirs for ever, all the liberties written out below...."

The specific commands of the Magna Carta include, among others, that 25 barons shall be elected by the barons, and that "in the event of disagreement among" them "the verdict of the majority present shall have the same validity as a unanimous verdict"; that "any man" whose rights are transgressed by government may "claim immediate redress" to such barons "or in our absence from the Kingdom to the chief justice"; that no "corn or other movable goods" or "horses or carts" or "wood for our castle" are to be taken from "any free man, without his consent"; that "no sheriff...or other royal officials are to hold lawsuits that should be held by the royal justices"; that "no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it"; that "no free man shall be seized or imprisoned...except by the lawful judgment of his equals or by the laws of the land"; and that "to no one will we sell, to no one deny or delay right or justice."*/

You and other Founding Fathers know that some of these and other rights have been interpreted, in later years, to include not only the right to trial by jury, but also the right of habeas corpus ("produce the body" of a person who has unlawfully been imprisoned, sometimes at an unknown location), and the right of Parliament to levy taxes.

As you learned, the Magna Carta was enormously important to the emergence of the Rule of Law: previously, and thereafter, monarchs were often deemed to possess "divine rights"; they did not recognize "legal rights", whether to property or otherwise. Instead, they arbitrarily bestowed or withheld favors, exacted tribute, and meted out punishment--the Rule of Men, not of the Law. Personal, not Impersonal, Government. There had been earlier compilations of laws, like Hammurabi's Code in 1700 B.C. and the Lawbooks of Emperor Justinian in the 6th Century (and there will be the Code Napoleon in 1804, codifying French civil law), but these laws could, at a monarch's whim, be applied or ignored.

The Magna Carta decreed, in effect, the supremacy of the law--that even a monarch must obey the law. In the short run, King John repudiated the document and was released by the Pope from its observance, triggering civil war. In the long run, the Magna Carta survived--and thrived, as the touchstone of the English constitutional system that is being reflected today, in modified form, in Philadelphia.

A later milestone in English history, important to you and your colleagues, was the Glorious Revolution in England almost 100 years ago, in 1688. The English deposed their Catholic King James II, and installed as joint rulers Queen Mary II (the daughter of James) and her Dutch husband, King William III. As a condition to their appointment, William and Mary were required to agree to the 1689 English Bill of Rights.

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*/ These quotations are from the version issued by New York: Her Majesty's Stationery Office 1965, translated by G.R.C. Davis, "with certain minor alterations by Sir Ivor Jennings." Another version, which sets forth the original Latin together with J. C. Holt's English translation, has been issued by Cambridge, At the University Press, 1965.

--English Bill of Rights-1689--*/

The first half of the English Bill of Rights describes twelve examples of the efforts of King James II "to subvert and extirpate the Protestant religion, and the laws and liberties of this kingdom", by suspending laws "and the execution of laws, without consent of Parliament", by quartering soldiers contrary to law, and, among others, by violating the freedom of elections and by "prosecutions in the Court of King's Bench, for matters and causes cognizable only in Parliament; and by diverse other arbitrary and illegal courses".

(The emphasis is ours, to indicate that it is not novel to seek through a supreme court what could not be achieved through the legislature; and that the Iran-Contra affair has precedents.)

Other charges leveled at King James included "excessive bail" and "excessive fines" and "illegal and cruel punishments", and by imposition of "fines and forfeitures before any conviction of judgment", etc. (To those who have read the Virginia Declaration of Rights--attached as Appendix D--or our Constitution, does this sound familiar?)

After such catalogue of mischiefs, in the second half the "Lords Spiritual and Temporal, and Commons" (the members of Parliament) proclaimed that "for the vindicating and asserting their ancient rights and liberties": "1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal" (reminiscent, is it not, of our "Personal Government" problems), and added 12 more laws, dealing with the matters of which they had complained in the first half, including trial by jury, "petition" to Kings, and "redress of all grievances"--many of the basic matters addressed in our original Constitution or our Bill of Rights.

England thus completed what it had begun with the Magna Carta--to confirm the Rule of Law and the supremacy of Parliament over the monarchy, and thus to proclaim that the people, acting through Parliament, were to possess the primary governmental power.

--Influence of England's Constitutional System--

As Encyclopaedia Britannica explains, England's Constitution consists of (i) the legislative enactments of Parliament (including, by tradition, the Magna Carta), (ii) English (common-law and equity) court decisions, (iii) customs, or conventions, like the resignation of the executive Government if it fails to secure a majority vote in Parliament on a major issue, and (iv) literary sources, such as textbooks of political theorists like the famous Albert Venn Dicey. The constitutional branches or components are the executive, the legislative, and the judicial (those three being the "government"), and the established Anglican Churches of England and Scotland.

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*/ Attached as Appendix C

The Prime Minister (or chief executive) is selected by the Parliamentary majority, and the executive branch members (including most members of its cabinet) are actually a Parliamentary-majority committee (a mixing of the executive and legislative). The judiciary (together with the executive and legislature) historically came from the Curia Regis, a council of royalty and others assisting the King, and is inextricably entwined with "Law Lords" and others in Parliament.

You and the other Founders have studied England's complex system, and have decided, for America's Constitution, to make at least six major departures from the mother-country's system: (i) there will be no monarch or royal titles (since monarchs and royalty are inconsistent with the democratic republic you are founding, and since their greed, machinations and caprice have led too often to wars), (ii) there will be no Government religion, either as part of Government or controlled by the Government, (iii) you will, astonishingly, provide for a separate judicial branch, (iv) you will draw upon an Englishman, John Locke, and a Frenchman, Montesquieu, in establishing a political system that separates the powers of branches of Government and includes numerous checks and balances between the branches, (v) you will provide for the people's direct (or virtually direct election, through electors) of the President, and (vi) you will establish a written Constitution, although it will be supplemented and complemented by principles and precedents established by England's "common law" and England's distinction between courts sitting "at law" or "in equity".

The "common law" in England was simply law made by judges in specific cases, in the absence of controlling written laws. This "common law" has been largely adopted in America's colonies for such matters as the law of contracts (and will later be adopted by all states except Louisiana, which will adopt the "civil law" of the French). In America, however, as a general matter there is no federal common law, and each state has adopted its own version of the English common law but has augmented such law with its own "case-law" or judge-made law. (In later years, many states will adopt "uniform laws", such as the Uniform Commercial Code, to decrease diversity on matters in which relative uniformity is clearly preferable to diversity.)

The distinction between courts sitting "at law" or "in equity" is explicitly adopted by your colleagues in Philadelphia, when they state in Article III of the Constitution that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution...." As American and English lawyers know, the distinction is between a court's sitting "at law", when there is clear written law or common-law that is applicable, or "in equity", when principles of "equity" or fairness must be invoked because of the absence "at law" of an adequate remedy.

You have adopted the English concept that individual liberty is secured by the rule of law, and is based upon the assumption that all governmental powers are based upon law. In studying Dicey, a legal theorist whose works (as mentioned above) are in fact a part of England's constitution, you and other lawyers among our forebears probably noted, and clearly adopted, two fundamental ideas: (i) there is, and should be, an absence of arbitrary power in government, and all government officials are subject to the dictates of the law and the courts, and (ii) the constitution is not the source, but the consequence, of individual rights. Both of these concepts are clearly reflected in the Declaration of Independence, the original Constitution now being drafted, and in the Bill of Rights that soon will be drafted.

Perhaps you and your colleagues are wrong, in creating a written Constitution, and perhaps you, Madison and others, even Hamilton, should follow your instincts and resist more vigorously the pressures to incorporate specific rights in the ensuing Bill of Rights. (On balance, however, your collective decision probably will be wise: without a written Constitution enumerating at least most of our basic rights, perhaps today we would enjoy fewer rights than we do.)

The above discussion of England's legal system and principles may demonstrate what your friends in Philadelphia mean (i) when they merely refer to "the judicial Power", as a power that primarily means the judicial power heretofore exercised in England, and consequently in the colonies, (ii) when they will soon refer, in the Bill of Rights, to "suits at common law", (iii) when they refer to Cases in Law "and Equity, arising under this Constitution [and] the Laws of the United States" (emphasis added), evidently indicating that the principle of "equity" should be applied to the Constitution and federal statutes, as well as to judge-made common-law cases, and (iv) when they decide that individual rights are so well established under our adopted English legal system, and under the Declaration of Independence you drafted, that it is unnecessary to enumerate them in the original Constitution.

--Renaissance, and Age of Englightenment--

The 16th through 18th Centuries raised from youth to maturity the political theories adopted by you and the other Founders in the late 18th Century. This period also gave rise, however, to the individual's spirit and vitality you see in America today (and that will raise America to eminence in the 20th Century).

The preceding Renaissance was just that: a rebirth, in man's interest in humanism: in learning about man, nature, ideas, and the world. This was modern man's youth, in the 14th through 16th Centuries. Men like Columbus, Magellan, and Vasco de Gama explored the farthest reaches of the seas, using the newly-invented clock and navigational instruments like the compass.

Men like Petrarch (who has been called the first and greatest humanist) studied anew the Greeks and the Romans, as did Erasmus, a Dutch Catholic priest who was one of the finest, most perceptive humanists. It was also the era of Sir Thomas More, the Catholic humanist in England who is called the "Man of all Seasons"; he was the man of conscience who lost his life, for not deferring to the wishes of Henry VIII.

And the era of Montaigne, the one-time mayor of Bordeaux who became a recluse and issued essays whose wisdom, charm, and humor are considered exemplary (even in the 20th Century). And Rabelais, the Benedictine monk whose satires burlesqued the worst in society, but also were trenchant commentaries on philosophy and politics.

Certain of this humanism occurred primarily within a religious setting, as with Erasmus, Sir Thomas More, and Rabelais, while other humanism prospered in a more secular setting, as with Petrarch and Montaigne.

In art, Michelangelo, Raphael, Titian, and others changed man and nature from one-dimensional to three-dimensional, with perspective, depth, warmth, and color. Their works reflected in art what was occurring in life. Their patrons included the Church, in Rome, and the Medici in Florence, and Sforza in Milan.

These same patrons supported Leonardo da Vinci, the artist--but also an inventor, engineer, and scientist (hydraulics, mechanics, anatomy, botany, and geology), and a musician and philosopher. The quintessential Renaissance Man, who said that "the natural desire of good men is knowledge".

The Renaissance was also the backdrop for the bold and ruthless Cesare Borgia, upon whose life the diplomat Machiavelli dispassionately drew for his classic, The Prince--one of the first truly objective portrayals of politicians. (We observe with interest today when politicans, both Republican and Democratic, have learned that the short-term advantages of the practices revealed in The Prince succumb, sooner or later, to the truth of Abraham Lincoln's "you can't fool all of the people all the time.")

So the Renaissance began an age in which medieval beliefs began to evolve into what you now accept as customary: modern, intellectual activity. Intellectuals all over Europe began to write, to explore, to communicate with each other. Sometimes under Church auspices and direction (religious humanism), but increasingly alone or in groups that gathered in private or public settings (secular humanism).

You and some of your contemporaries are justly called "Renaissance Men", with your spirit of inquiry and your varied interests and skills. In your century it is not only intellectuals who inquire and explore both nature and ideas. It has become common, and even fashionable. Even King George III, against whom you directed the Declaration of Independence (and who will soon be upbraided, by his own people, for excessive "personal government"), is fond of botany. (Today, this spirit is exemplified in our phrases: "See for yourself", "Look around you", "Make up your own mind", "Take a good look".)

You know that the Renaissance overlapped with, and evolved into, the 16th and 17th Centuries' Reformation. This was begun by Catholics, but completed by Protestants--after Martin Luther in 1517 nailed his theses on the Wittenberg church-door, proclaiming man's personal responsibility for his salvation, and man's religious justification by faith alone.

In 1453, Gutenberg had printed a Bible (later to be found in the library of Louis XIV's adviser, Cardinal Mazarin, and hence called the "Mazarin" Bible), but Luther translated the Bible into German. The printing press soon assumed astonishing religious, secular, and political importance. Now the Bible could be read by any person and thus serve as the direct basis for such person's faith, without church rituals or intercession.

The printing press permitted dissemination of information. Books and newspapers could contain not only heresy, but also could report on anything else that men and women thought, said, or did. Had the printing press not been invented and widely used before your compatriots began drafting, those men might now be drafting a much different Constitution, studded with fewer novel and even revolutionary ideas.

You say that given a choice between "a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."

You know that freedom of speech, and of the printing press, is still a novelty. A mere century earlier, England still imposed through licensing the prior censorship of publications, and made criticism of government a felony. England also restricted reporting on parliamentary debates until the 1770's, the decade in which you wrote the Declaration of Independence. You and most of the other Founders are determined to end such restrictions: America shall have complete freedom of speech, and of the press.

As man's quest for knowledge of science and nature expanded together with his reflections on philosophy, the influence of the Church's theology and dogma lessened--and the Age of Science, of Reason, and of Enlightenment flourished. Previously, Galileo had become a physicist, mathematician, and astronomer, developing theories on nature and natural laws and devising mathematical formulations on physics. Then Newton's Principia mathematica was published, in 1687, and examined astronomy and the movements not only in the skies but also in nature, on the seas and elsewhere on earth. It dominates scientific inquiry today, by you and other Americans (and will dominate such inquiry, both in America and Europe, for at least one more century). And other scientists inquired, experimented, formulated, and invented.

As the scientists explored new subjects, Voltaire, Hume, Rousseau, Kant, Montesquieu and others pressed further in thinking and writing about philosophy and political theory, and in employing reason rather than only faith. Only 36 years ago, in 1751, Diderot began to publish a massive undertaking: an "encyclopedia" that attempted to portray much of man's total knowledge and skills. It includes extensive and precisely detailed, sequential drawings on anatomy and medical instruments, that already are being used by physicians to improve their skills. And similar drawings on weaponry and military tactics, and sports, trades, industry, animals. A few trade guilds are incensed at this divulging of their trades' secrets.

But Modern Man will not be stopped, and has fully emerged--and nowhere so boldly, or with so much determination and enterprise and independence, as in America. This secular humanism is America's birthright, and it is being memorialized and given a foundation, for now and posterity, in Philadelphia today. And it will be the touchstone, implemented by individuals acting independently, in the explosive growth and development of America. An America in which some will say "Now hear this!" and "Listen up!", but in which most will say "Think for yourself", "Be your own man", "Show me!" and "Prove it!", but also "Don't tread on me" and "Give me liberty or give me death". And, perhaps most important (with all of its political and civil implications), "You can be anything you want to be."

APPENDIX B, TO STATEMENT BY LAWYERS FOR THE JUDICIARY

Responses to Pro-Bork Arguments

We discussed in the Statement and Appendix A the major arguments made by Judge Bork's proponents, with the principal exception of the case-by-case analysis of his court opinions, a subject for inexhaustible debate-- as already manifested at the Senate hearings.

We restrict ourselves here to other arguments of Judge Bork's supporters, and to amplification of two or three matters discussed previously.

1. Judge Bork "has changed" "or will change".

After watching the Senate hearings to date,we conclude that Americans have heard most of what may be said on this subject. For further edification, Americans may wish to study the many Supreme Court books by John P. Frank, and Laurence Tribe's God Save This Honorable Court (especially the chapter entitled "The Myth of the Surprised President").

Then, perhaps reread our Statement's section entitled "A Major Concern", review the Senate hearings' testimony on Judge Bork's extra-judicial comments that extend even to early in 1987. Then determine how much Judge Bork has changed, and how assiduously this Administration has tried to ensure that the President will not be surprised by Judge Bork's future decisions.

2. Judge Bork will demonstrate "judicial restraint".

This, too, has been discussed in the Statement and Appendix A. We sadly conclude that this argument, if successful, will constitute yet another triumph of Madison Avenue's and Hollywood's skills, over common-sense and straight-talk.

For those who question our Statement's recitation that the Supreme Court until World War II was largely conservative, and largely activist, and instrumental through its activism in expanding the national government's powers, we suggest that they test the accuracy of our remarks by consulting their lawyer friends or any second-year law student, of whatever political persuasion.

Further light may be cast on the question of which type of Court has shown judicial restraint traditionally, and still today (except for the post-war liberal court through the 1960's and part of the 1970's), by two quotations from Max Lerner's recent New Republic article (in which, we should stress, Lerner advocates confirmation of Judge Bork):

> "The fact is that there is now an "activist" judicial culture that is mostly liberal (in the '20s and early '30s the activists were conservatives) and a "judicial restraint" culture that is mostly conservative (when it was once liberal). Bork, at least in rhetoric, champions a restraint philosophy that will be politically "neutral.""
>
> And: "A conservative activist Court ruled imperially to freeze the status quo under Republican presidents from the Civil War to the New Deal."

Americans should ponder, very seriously, just how much of the earlier post-war, liberal judicial "activism" they want to reverse. This activism dealt primarily with civil rights and the Bill of Rights.

At some point we will have to resolve, candidly and finally, the ongoing controversy over blacks. Can we ship them all back to the South, and thereby reduce the racial friction and expense engendered in the North? What about that line that those English surveyors drew (a decade before the Declaration of Independence) as a southern boundary for Pennsylvania: can we build a high wall along Charles Mason's and Jeremiah Dixon's line, and extend it west around the Great Lakes States (and let Iowa and Missouri decide which side they want to be on), and build another wall along the eastern borders of the Pacific-Coast States? (But let us at least invite Virginia to join us. We need some of those Southern Gentlemen who gave us most of our rights, and who gave us four of our first six Presidents.) Then we can again establish two governments and two military forces, and prohibit Northerners from spending tourist dollars in the South, and establish separate immigration policies (the North's will have to be considered more carefully, since the vast majority of immigrants have always come to the North, for its industry and prosperity). Is this what Americans want?

In short, let us fish or cut bait. Apart from the right-wing extremists responsible for the anti-black (equal representation and affirmative action) portions of the President's social agenda, the Silent Majority seems to have approved school desegregation, and equal voting rights, and equal job-opportunities (if not all affirmative action programs) for blacks.

Yes, the school desegregation decision was made by the Court (led by Chief Justice Warren, who initially was sometimes criticised as being too conservative), but it was enforced by President Eisenhower and most subsequent Presidents.

Military desegregation was initiated not by the Court but by executive actions of Presidents Truman and Eisenhower; and the major civil-rights legislation was spearheaded by President Johnson and certain members of Congress (and duly filibustered by certain current, ardent supporters of Judge Bork). Does anybody regard Presidents Truman, Eisenhower, and Johnson as soft-headed or "egg-heads" -- or were they hard-headed pragmatists motivated by a sense that what they were doing was not only "fair" and "right", but also smart -- that these controversial acts best served America's long-term interests and, for about the same reasons, would be politically acceptable to the majority of Americans.

If we want to roll back civil-rights advances, we had best be thorough: right now, every adult black has a vote equal to ours, and those votes can hurt us if blacks start to exhibit the same prejudice we have shown to them.

Chicago's retiring Police Superintendent Rice (who ensured that whites continued to enjoy as much police protection as in earlier administrations) said recently, after studying Judge Bork's past rulings: "if we had nine Borks on the Supreme Court, I'll have to find one good white man to buy me".

How much "liberalism" do people want to roll back? Social Security? Medicare and Medicaid (that the American Medical Association resisted for over four decades)? FDIC insurance on their bank accounts?

And the Court's liberalism in the 1960's, on the Bill of Rights, often involved criminal matters -- and, sometimes, deplorable persons. Nonetheless, as stressed at the Senate hearings by another one of those Southern Gentlemen, North Carolina Professor William Leuchtenberg, the Court's decisions in the 1960's (and partly earlier) established and confirmed, one by one, that the Bill of Rights and other Constitutional protection we have against federal government action (on freedom of the press, and of religion, and against self-incrimination, and the right to counsel, etc.) is applicable, through the 14th Amendment, to state action.

Do Americans trust state action more than federal action (expecially if state legislatures are given much more latitude pursuant to Judge Bork's majoritarianism theory)?

Max Lerner, although he supports Judge Bork, has some thoughts on those roll-backs. His *New Republic* article states also that "the necessary social upheavals of a nation are often tricky and always hard-won, but once in place, they are not easily dislodged", and "Mostly the "social issues" have run their liberal course. Their expansion may be stopped, but a steep roll-back would be too divisive."

As to economic regulation, Americans had best complain to Congress and their state legislatures. Since about 1937 the Court (both when liberal and when conservative) has in fact demonstrated judicial restraint and permitted Congress and state legislatures to impose increasing regulation. In this area, the Court should not be made a scapegoat.

3. *Judge Bork will be "tough on crime"*.

On pages 55 and 56 of our Statement, we discussed the "law and order" demagogues and asked whether the demagogues have in fact reduced crime. But knee-jerk reactions to the phrase continue unabated, as do the demagogues' comments: readers may remember the newspapers' reports in late August about the law-enforcement officials gathered by the President in Los Angeles, to support Judge Bork's nomination. Those officials included, among others, Illinois Governor Thompson (a former United States Attorney), and Attorney General Meese.

We somehow find more persuasive, realistic, and candid, the remarks (quoted in the September 5, 1987 *Chicago Tribune*) of Chicago's retiring Police Superintendent Rice -- a man who diligently enforced the law in a city that we believe has every race, creed, and color, and every ethnic group, and every crime, that can be found in America:

> "When you say hard line, any time anyone espouses circumvention of the Constitution and suspension of the rights of individuals, whether it's the victim or the offender, you have got to be careful of that guy."
>
> "You know Hitler was right-wing when it came to crime. He had a Gestapo that had carte blanche over the rights of people. Is that what we want? This country was founded on democratic principles, and it is incumbent that we have to be careful that those rights are not infringed upon by well-meaning people."
>
> "Law and order is all right, but you must have justice with law and order. Respect my rights, and I'll respect yours."

4. Judge Bork's opponents are being "political" and "ideological".

Madison Avenue and Hollywood again. (And see "Nonsense and Sense" beginning on page 3 of the Statement.) Granted, in the Senate there are political motivations on both sides of the aisle, just as there were in the Constitutional Convention. But this argument should be deemed only an opening salvo, not a conclusive bombardment. The real question is whose substantive arguments make sense.

This argument is also patently offensive and untrue, when directed at the black and women's-rights opponents of Judge Bork.

5. The Supreme Court need not be "balanced".

We conceded this, with reservations, on page 6 of our Statement. But as we listened to two former Presidents of the American Bar Association testify against Judge Bork at the hearings, we wondered if we were too moderate in our reservations. We found persuasive the comments of one such ex-President, Mr. Chesterfield Smith.

Mr. Smith testified in effect that as a trial lawyer, he is happy with two conservatives like Justices Scalia and Rehnquist at one end, and two liberals like Justices Marshall and Brennan at the other end, but he wants "somebody in the middle I can talk to".

6. The President is doing nothing more than what President Roosevelt sought in the 1937 court-packing.

The President is openly and candidly seeking to accomplish through Supreme Court appointments what was denied him by Congress.

President Roosevelt enjoyed huge majorities in Congress (331 Democrats to 89 Republicans in the House, and 76 to 16 in the Senate, after the 1936 elections). This Congress agreed with the President, hence the conservative Court was thwarting the will of Congress as well as the President.

President Roosevelt's proposal was to add one new justice (to a maximum of six) for each present Justice who was age 70 or older. And it was this Democratic Congress that nevertheless rebuffed the President's plan.

As is known, the Court then began to be less conservatively activist, and began upholding such laws as state minimum-wage laws for women, and the Social Security Act.

A historical footnote: The number of Justices is established by Congress, not the Constitution.

In 1789, Congress set the number at six. The conservative Federalists reduced the number to five, to delay the time at which the liberal Jefferson's appointments might become influential. Then in 1802, back to six. Thereafter, a new Justice was added for each new federal circuit court. Then seven (1807), nine (1837), a proposed seven (1866), then finally nine (1869). That history might be kept in mind, not only for 1937 and 1987, but for the future. This power is in the hands of Congress.

7. Miscellaneous other arguments.

These run the gamut. Often they are nothing more, or less, than distortions of words or principles. In the Statement we discussed the fact that Judge Bork seems to conclude that since individuals' rights are not "absolute" (with which we agree), they can be trivialized and vastly reduced.

And the Solicitor General's "political deputy" (whose school-prayer arguments were discussed on pages 27 and 28 of the Statement), in referring to the relationship between the Solicitor General's office and the Attorney General, said "It has never been real independence". (Emphasis his, not ours.) Again, we agree, but the consequences of that kind of rationalizing were described on pages 35-38 of the Statement.

We shall give the last word, on these and similar arguments, to Abraham Lincoln. Most of the first will be recognized by many Americans, but its opening, and the second quotation, may be less well-known:

> "If you once forfeit the confidence of your fellow citizens, you can never regain their respect and esteem. It is true that you may fool all the people some of the time; you can even fool some of the people all the time; but you can't fool all of the people all the time."
>
> "If there ever could be a proper time for mere catch arguments, that time surely is not now. In times like the present, men should utter nothing for which they would not willingly be responsible through time and in eternity."

APPENDIX C, TO STATEMENT BY LAWYERS FOR THE JUDICIARY

English Bill of Rights
(1689)

Whereas the Lords Spiritual and Temporal, and Commons, assembled at Westminster, lawfully, fully, and freely representing all the estates of the people of this realm, did, upon the thirteenth day of February, in the year of our Lord one thousand six hundred eighty-eight, present unto their Majesties, then called and known by the names and style of William and Mary, Prince and Princess of Orange, being present in their proper persons, a certain declaration in writing, made by the said Lords and Commons, in the words following:

1. By assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without consent of Parliament.

2. By committing and prosecuting divers worthy prelates for humbly petitioning to be excused from concurring to the same assumed power.

3. By issuing and causing to be executed a commission under the Great Seal for erecting a court, called the Court of Commissioners for Ecclesiastical Causes.

4. By levying money for and to the use of the Crown, by pretence of prerogative, for other time, and in other manner than the same was granted by Parliament.

5. By raising and keeping a standing army within this kingdom in time of peace, without consent of Parliament, and quartering soldiers contrary to law.

6. By causing several good subjects, being Protestants, to be disarmed, at the same time when Papists were both armed and employed contrary to law.

7. By violating the freedom of election of members to serve in Parliament.

8. By prosecutions in the Court of King's Bench, for matters and causes cognizable only in Parliament; and by diverse other arbitrary and illegal courses.

9. And whereas of late years, partial, corrupt, and unqualified persons have been returned and served on juries in trials, and particularly divers jurors in trials for high treason, which were not freeholders.

10. And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subject.

11. And excessive fines have been imposed; and illegal and cruel punishments inflicted.

12. And several grants and promises made of fines and forfeitures, before any conviction of judgment against the persons upon whom the same were to be levied.

All of which are utterly and directly contrary to the known laws and statutes, and freedom of this realm.

And whereas the said late King James II has abdicated the government, and the throne being thereby vacant his Highness the Prince of Orange (whom it hath pleased Almighty God to make the glorious instrument of delivering this kingdom from popery and arbitrary power) did (by the advice of the Lords Spiritual and Temporal, and divers principal persons of the Commons) cause letters to be written to the Lords Spiritual and Temporal, being Protestants, and other letters to the several counties, cities, universities, boroughs, and Cinque Ports, for the choosing of such persons as represent them, as were of right to be sent to Parliament, to meet and sit at Westminster upon the two-and-twentieth day of January, in this year one thousand six hundred eighty and eight, in order to such an establishment, as that their religion, laws, and liberties might not again be in danger of being subverted; upon which letters, elections have been accordingly made.

And thereupon the said Lords Spiritual and Temporal, and Commons, pursuant to their respective letters and elections, being now assembled in a full and free representation of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid, do in the first place (as their ancestors in like case have usually done), for the vindicating and asserting their ancient rights and liberties, declare:

1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.

3. That the commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all others commissions and courts of like nature, are illegal and pernicious.

4. That levying money for or to the use of the Crown, by pretence of prerogative, without grant of parliament, for longer time or in other manner than the same is or shall be granted, is illegal.

5. That it is the right of the subject to petition the king, and all commandments and prosecutions for such petitioning are illegal.

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.

7. That the subjects which are Protestants may have arms for their defence suitable to their conditions, and as allowed by law.

8. That election of members of parliament ought to be free.

9. That the freedom of speech, and debates of proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.

10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishment inflicted.

11. That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.

12. That all grants and promises of fine and forfeitures of particular persons before conviction are illegal and void.

13. And that for redress of all grievances, and for the amending, strengthening and preserving of the laws, parliaments ought to be held frequently.

And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties; and that no declarations, judgments, doings or proceedings, to the prejudice of the people in any of the said premises, ought in any wise to be drawn hereafter into consequence of example.

APPENDIX D, TO STATEMENT BY LAWYERS FOR THE JUDICIARY

Virginia Declaration of Rights

(1776)

A declaration of rights made by the representatives of the good people of Virginia, assembled in full and free convention; which rights do pertain to them and their posterity, as the basis and foundation of government:

Section 1. That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Section 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants and at all times amenable to them.

Section 3. That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety and is most effectually secured against the danger of maladministration; and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

Section 4. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary.

Section 5. That the legislative and executive powers of the state should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part, of the former members, to be again eligible, or ineligible, as the laws shall direct.

Section 6. That elections of members to serve as representatives of the people, in assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage and cannot be taxed or deprived of their property for public uses without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented for the public good.

Section 7. That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights and ought not to be exercised.

Section 8. That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.

Section 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 10. That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.

Section 11. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred.

Section 12. That the freedom of the press is one of the great bulwarks of liberty and can never be restrained but by despotic governments.

Section 13. That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural and safe defense of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.

Section 14. That the people have a right to uniform government; and, therefore, that no government separate from or independent of the government of Virginia ought to be erected or established within the limits thereof.

Section 15. That no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.

Section 16. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity toward each other.

The CHAIRMAN. Thank you, Dean, for a very concise and thoughtful statement.

My colleague from South Carolina, Senator Stennis? Senator Thurmond? I was wondering how Senator Stennis is going to vote.

Senator THURMOND. Mr. Clay, I noticed you say you have about 700 lawyers in this group?

Mr. CLAY. Yes, Senator.

Senator THURMOND. How many lawyers are there in the State of Illinois?

Mr. CLAY. I don't know the exact number, Senator. I would guess most people think there are too many.

Senator THURMOND. Well, aren't there about 50,000?

Mr. CLAY. Oh, there may be. There may be.

Senator THURMOND. Well, don't you have some idea, you are a member of the bar, aren't you?

Mr. CLAY. Fifty thousand is probably a good figure.

Senator THURMOND. And you have 700 opposed to him.

Mr. CLAY. That is correct.

Senator THURMOND. So there could be 49,300 for him, then?

Mr. CLAY. No, I wouldn't reach that conclusion, Senator. I am not aware of any group, as a matter of fact, of lawyers that has been organized to support him in Illinois.

Senator THURMOND. As a matter of fact, does your group come mainly from the Chicago Council of Lawyers?

Mr. CLAY. No, I wouldn't say that.

Senator THURMOND. Well, that is the heart of it, though, isn't it?

Mr. CLAY. No, I wouldn't say that it is the heart of it.

Senator THURMOND. Isn't that the heart of your group, a group of liberal lawyers in Chicago?

Mr. CLAY. It is a cross section, as I have said, Senator, and we haven't identified people actually. We know we have some Republican lawyers.

Senator THURMOND. Do you know Judge Bork?

Mr. CLAY. I am sorry?

Senator THURMOND. Do you know Judge Bork? Do you know Judge Bork?

Mr. CLAY. No.

Senator THURMOND. You don't know him.

The CHAIRMAN. Do you know? Are you personally acquainted with Judge Bork?

Mr. CLAY. No, I don't know Judge Bork. I don't know Judge Bork.

Senator THURMOND. Well, Chief Justice Burger knows him. Chief Justice Burger says he is in the mainstream, and he says these people who call him an extremist are in error. And if Judge Bork is an extremist, he is an extremist.

Well, you wouldn't call Chief Justice Burger an extremist, would you?

Mr. CLAY. No, I never have.

Senator THURMOND. Do you know Mr. Lloyd Cutler?

Mr. CLAY. I just know him by reputation, Senator.

Senator THURMOND. Doesn't he have a good reputation?

Mr. CLAY. An excellent reputation.

Senator THURMOND. He is a liberal Democrat.

Mr. CLAY. Well, he is at least a Democrat.

Senator THURMOND. Well, he holds Judge Bork in high esteem, and came here and endorsed him very highly.

Do you know the Governor of your State, Governor Thompson?

Mr. CLAY. I don't know him personally, Senator.

Senator THURMOND. Well, he came here and endorsed him, very highly. And I could go on and on, very prominent people. Seven deans of law schools came here yesterday and endorsed him highly. Four more very prominent lawyers and antitrust experts came here and endorsed him highly.

I don't know what you all have against this man. Is this an imagination, or a figment? Have you been misinformed, or have you really become acquainted thoroughly with his work on the circuit bench?

He has written over 150 decisions. He has participated in over 400 decisions. None of them have been reversed by the Supreme Court, so he must be in the mainstream. He must be a fairly good man anyway, if Chief Justice Burger and Lloyd Cutler and all these people have endorsed him who have.

No questions.

The CHAIRMAN. Dean, do you know Judge Bork?

Mr. ROBERTS. Yes, Senator, I do. I was a student of his and I was also a colleague of his on the Yale faculty when I was associate dean of the law school.

The CHAIRMAN. I see.

Senator THURMOND. He didn't give you a low mark, did he?

Mr. ROBERTS. No, sir, he didn't. I think it was a "B," Senator. I can't remember exactly.

The CHAIRMAN. Well, you better be able to remember exactly. I know from experience. You better get it precisely right. [Laughter.]

Mr. ROBERTS. I neglected to check it before my appearance.

The CHAIRMAN. It takes a while to get your transcript I know.

Senator Specter? Oh, I beg your pardon. I am sorry. I should go to this side. Do any of my colleagues on this side have a question? Senator, do you wish to go first? Senator Simon? I am sorry.

Senator HEFLIN. No, let him.

The CHAIRMAN. I beg your pardon.

Senator Simon, from Illinois?

Senator SIMON. Yes, Mr. Chairman. First, if I may say to my distinguished colleague from South Carolina here—if I may have Senator Thurmond's attention for just 1 minute.

Senator HEFLIN. He may be President, you know. You better listen to him.

Senator SIMON. If I may say to my distinguished colleague from South Carolina, the Chicago Council of Lawyers so far has endorsed every nominee that the Reagan Administration has brought up, with the exception of two, Judge Bork and a nominee from the State of Indiana. In all other cases they have supported the nomination. I just thought I would clarify that for the record.

Senator THURMOND. That is a pretty good record. You could have had 100 percent if you had endorsed this man, wouldn't you?

Senator SIMON. If I may ask the three of you this question. There has been a substantial shift of position from what Judge Bork has written in his articles to what he has testified here, and there are those who say that shift of position indicates that he really is in the mainstream and that we are simply going back to positions that were once held by someone but are no longer valid.

What is your response to that?

Mr. ROBERTS. Senator, I think you have to talk about specific issues, but in large measure I think he has not changed his underlying views. I think that you have to look at each issue.

On the 14th amendment issue, for example, on the question of whether gender is included in the ambit of the 14th amendment, I think Judge Bork's response was an unsatisfactory one from a lawyer's point of view. He argued that we should look at the basis for the legislative action and judge it to see whether it was reasonable.

Well, we know, looking at the Supreme Court jurisprudence over this whole period of years, that that is not a very good test. It is not a test that knocks out very many State laws, so it does not provide protection for minorities under the 14th amendment.

I don't think his view changed; and, if that is now his view, it is not a view that would allow the constitutional protection to be spread over very many people.

As to his controversial views about dissenting speech and the discussion about *Hess* and *Brandenburg* that went on during the hearings, there it seemed to me his views were confusing. I am not sure really what he believes about them except that he still seems to maintain that the underlying theory of those cases is invalid—that is, that we should protect subversive speech as an important value under the first amendment. I think he still holds that view.

Just because he believes that *Brandenburg* is a precedent that he would follow does not mean that he accepts the underlying theory, and, as you know, it is quite often possible for a judge to say, well, I accept this as binding, but this new case is different on its facts and therefore isn't controlling.

Senator SIMON. I have no further questions. I just want to thank the witnesses, particularly since they are from my home State. I appreciate that.

The CHAIRMAN. Thank you.

Senator Specter?

Senator SPECTER. Thank you, Mr. Chairman.

The statement which you have submitted refers to judicial activism on the part of Judge Bork in *Dronenburg* v. *Zech* and *Ollman* v. *Evans*. Are you critical of him for his decisions in those cases?

Mr. CLAY. The point that was made in the statement I think was merely to show that Judge Bork himself has been criticized by very responsible fellow judges of the Courts of Appeal—in the *Ollman* case, that was by Judge Scalia—as lacking judicial restraint. In *Dronenburg* there were four judges who, in their special opinion, accused Judge Bork of using the occasion of his opinion for what they called a general spring housecleaning of constitutional law issues, and then they said "judicial restraint begins at home."

I guess partly the point being made here is that sometimes judicial restraint seems to be rather subjective.

Senator SPECTER. Well, Judge Bork has written extensively that he favors judicial activism if it is judicial activism in support of the constitutional principle.

But coming back to the *Ollman* case, that case has been cited generally for a proposition that Judge Bork was on the right track in expanding first amendment freedoms to give protection to the Evans and Novak comments about Professor *Ollman,* turning on an issue of fact or opinion but was a good opinion, progressive or expansive of first amendment rights.

Would you disagree with that, Mr. Clay?

Mr. CLAY. No, I wouldn't. The point that Judge Scalia made was that it was not necessary for Judge Bork to concur specially to reach the result in the *Ollman,* case which was a desirable result. And he merely pointed out that it was expanding the whole concept.

Mr. ROBERTS. Senator, I think what disturbs some people who try to make sense of all this is that it is difficult to understand why Judge Bork can take a rather expansive view in the libel case—I think that was a good opinion and the case was correctly decided—but is so reluctant to take a more expansive view in the privacy cases. It is difficult for me at least to understand a principled distinction between the process in those cases. I would have thought that you should come out in favor of *Griswold* and in favor of the position in *Ollman,* but he does not. So I think that is the confusing part.

Senator SPECTER. Well, in *Ollman,* Judge Bork articulates an interpretation of a first amendment value. He starts with a specifically articulated right in the Constitution. On *Griswold,* as we well know, especially everybody in this room because *Griswold* is the most discussed case in America today, he comes to the conclusion that there was no sound judicial basis for articulating the right of privacy and a line of criticism which has been shared by many people in terms of judicial construction. That the craftsmanship and the formulation of the right did not have a sound judicial underpinning.

Mr. Roberts, do you think—Dean Roberts, do you think that *Griswold* did have a sound judicial underpinning?

Mr. ROBERTS. Yes, I do. In fact, I think most of the academic criticism of *Griswold,* and even the judicial criticism, has really not gone to the core issue that there is an important overriding privacy value in the Constitution. And it doesn't start with *Griswold,* it goes way back to the early part of the century. It was building over a long period of time.

The word does not appear in the Constitution, but neither does the distinction between fact and opinion that Judge Bork makes so much of in the *Ollman* case. In that case he expanded the view that everyone had of the importance of fact versus opinion in libel jurisprudence.

Senator SPECTER. Well, I don't mean to suggest that I am opposed to the conclusion of *Griswold,* but *Griswold* has been criticized very extensively by some very learned scholars. Not in terms of the conclusion that there is a right of privacy, but the reasoning and the deductive process and the craftsmanship of the case.

Well, these are complex subjects and I wish we could talk about longer, but we hope to finish these hearings today, and my time is up.

Thank you very much, Mr. Chairman.

Senator HEFLIN. I suppose now I am chairing this, but let me ask you this, as I deferred to Senator Simon. It appears that we now have people that really go through a substantial period of what could be called campaigning for the Supreme Court. I am not sure whether that is good or bad, but anyway it appears to be. I think people are saying that Laurence Tribe is, in effect, a candidate and he is going through a campaign appealing to a certain element at the far—well, at an end of a spectrum. And the same has been said in regards to Judge Bork at the other end of this spectrum.

Do either one of you see any harm, fault, or whether it is healthy or unhealthy in the end if a person is appointed to the Court and has, in effect, gone through a period of 10–15 years as campaigning for it?

Mr. CLAY. Well, I would like to take a crack at that one, Senator. I think it is a deplorable practice. I really don't think people should campaign for the Supreme Court. I think, if they are interested in the Supreme Court, they should demonstrate their qualifications by the quality of their judicial work, if they are on the court, or their practice, if they are in private practice, or in other ways.

But I think it could lead to all kinds of very unhappy things if people were to customarily campaign for the Court.

Mr. ROBERTS. I think I would agree with John. I would say, however, that I would not want to suggest that Judge Bork, in fact, did that; nor do I think that Professor Tribe is doing that.

Senator HEFLIN. Well, I am just saying there are people that said that. I am not saying it, either.

Mr. ROBERTS. If it were to occur, I think it allows a judge or a law professor to change his or her views in ways that are not healthy, if he is trying to trim to whatever the prevailing political whims are at that period, and that would be unfortunate I think.

Senator HEFLIN. And the winds may change.

Mr. ROBERTS. Yes, indeed.

Mr. BOLEY. Senator?

Senator HEFLIN. There may have to be certain changes in order to keep up with the prevailing wind and the direction of the prevailing wind.

All right, sir.

Mr. BOLEY. I was just going to disagree mildly with my counterparts here. I think I see no problem with campaigning in the general sense if someone wants to end up eventually on the Supreme Court. I have no difficulty with that.

The difficulty I do have is when there is a short term and they are trying, in effect, to tailor their views to a particular President's or party's views. That may not be a true distinction here. But I, in general, in other words, do not have any problem with anyone seeking to end up on the Supreme Court. It is not an aspiration I share, but I think many lawyers would share it.

Senator HEFLIN. Well, while you don't concur in the result, your logic is about the same.

Mr. BOLEY. Yes, sir.

Senator HEFLIN. All right, sir. Well, we thank you.

Mr. ROBERTS. Thank you, Senator.

Mr. CLAY. Thank you.

Senator THURMOND. Thank you, gentlemen, for appearing.

Senator **Heflin**. Our next witness is Mr. Roy Innis. Mr. Innis is the head of Congress on Racial Equality, which is a civil rights organization.

Mr. Innis, if you would raise your right hand and repeat after me.

Do you solemnly swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Innis**. I do.

Senator **Heflin**. Do you have an opening statement?

Mr. **Innis**. Yes, I do.

TESTIMONY OF ROY INNIS

Mr. INNIS. As chairman of the Congress of Racial Equality, I support the nomination of Robert Bork to be an Associate Justice of the United States Supreme Court because I believe that he will apply the law in a fair and evenhanded way. His record as Solicitor General and as a federal appellate judge attest that Justice Bork would vigorously enforce civil rights laws on our statutes book and in the Constitution.

I also believe that Judge Bork's presence on the Supreme Court can contribute mightily to the efforts to confront and mitigate one of the most pressing problems facing black America today—urban crime.

I asked to come here in part to register my dissent from the monolithic voice of the organized civil rights orthodoxy of this country. This orthodoxy would seek to stifle dissenting voices in the black community. It would seek in the activist decision of yesterday solutions to very different problems facing our people today. This effort is futile, for the types of problems the black community faces cannot be solved primarily in the courts.

I wish to express my disappointment in those who have ignored Judge Bork's record in government service and instead seek to judge him by certain theoretical positions that he had taken as a professor many years ago. These people have, in my opinion, succumbed to the very evils of prejudgment that we as a movement have tried so hard to combat for so many years.

Judge Bork's firm approach to criminal law is a matter that should be of interest to the civil rights community, for crime preys more savagely on the poor of our major urban centers. Judges who show excessive concern for the rights of criminals and not enough for the victims of crime, do a disservice to all Americans, but particularly to the urban poor who bears the brunt of the enormous cost of rampant crime in our society.

Judge Bork does not coddle criminals; rather, he applies the law and the Constitution in a fair and impartial manner. For example, Judge Bork believes that criminals should not be set free for technical errors by the police wherein a deterrence to unconstitutional behavior is possible. Nor would Judge Bork stray from the plain terms of the Constitution to find that States cannot apply the death penalty in order to deter the commission of the most heinous crime.

But, at the same time, Judge Bork has not hesitated to vote for the reversal of a conviction when he believes that that is what the law requires.

This all brings me to why I asked to appear on behalf of Judge Bork. I was watching these proceedings, and knowing what I know of Judge Bork's public record on civil rights and his high quality as a lawyer, judge and legal scholar, I asked myself why the opposition to Judge Bork from my colleagues in the civil rights community were so intense.

It is true that in the past he took some academic position with which I and my colleague—my comrades in the civil rights movement have strongly disagreed. But I know that many who opposed the Civil Rights Act of 1964 for considerably less noble reasons than the libertarian rigor that Judge Bork was pursuing have later become great allies of civil rights and the civil rights movement.

People change. And Judge Bork has indicated his agreement with the civil rights laws, and by his actions and words, for many years. Despite his record of public service, Judge Bork has been wrongly attacked by my colleagues. I believe quite frankly that he has become the victim of a rigid and selectively unforgiving civil rights movement orthodoxy to whom the results desired have become more important than the fair and impartial application of law.

My colleagues have chosen to ignore Judge Bork's remarkable record of concrete civil rights achievement and have latched onto, in some cases distorted some of the man's ancient academic views in order to whip people into an irrational hysteria. To defeat him on this basis would be more than unfortunate.

What is upsetting my colleagues, I believe, is the notion that Judge Bork's exercise of judicial restraint will not guarantee the results that many of them want irrespective of what the Constitution and law requires. The tragedy of this misguided view is that this desire for an activist judiciary clearly shows how out of touch much of the civil rights movement is with the problems facing black Americans in the 1980's.

Rampant crime, inadequate education, single-parent families, teenage unemployment, AIDS and drug abuse, unlike desegregation and equal employment opportunities, are not problems that can be solved by even the most activist judiciary.

In closing, I would like to commend highly Professor Thomas Sowell and Attorney Jewel La Fontant for testifying at these hearings in support of Judge Bork. In the past, one had to have courage to fight wrongs from outside of the community. Today, one has to have strength and courage to combat evil from within our community. We must beware of the arrogance of early conversions. Late, deliberately arrived at conversions often are better.

It is for this reason that I support the confirmation of Judge Robert Bork to be an Associate Justice of the United States Supreme Court.

[Prepared statement follows:]

ROY INNIS
NATIONAL CHAIRMAN OF THE CONGRESS ON RACIAL EQUALITY
CONFIRMATION HEARINGS FOR SUPREME COURT NOMINEE
ROBERT H. BORK
BEFORE THE
SENATE JUDICIARY COMMITTEE

September 30, 1987

STATEMENT OF ROY INNIS

As Chairman of the Congress on Racial Equality, I strongly support the nomination of Robert H. Bork to be an Associate Justice of the United States Supreme Court because I believe that he will apply the law in a fair and even-handed way. His record as Solicitor General and as a federal appellate judge amply attests that Justice Bork will vigorously enforce the civil rights laws on our statute books and in the Constitution. I also believe that Judge Bork's presence on the Supreme Court can contribute mightily to the efforts to confront and mitigate one of the most pressing problems facing black Americans today -- urban crime.

I asked to come here in part to register my dissent from the monolithic voice of the organized civil rights orthodoxy of this country. This orthodoxy would seek to stifle dissenting voices in the black community. It would seek in the activist decisions of yesterday solutions to very different problems facing our people today. This effort is futile, for the types of problems the black community presently faces cannot be solved primarily in the courts.

Finally, I wish to express my disappointment in those who would ignore Judge Bork's exemplary record in government service and instead seek to judge him by certain theoretical positions that he had taken as a professor many years ago. These people have, in my opinion, succumbed to the very evils of prejudgment that we as a movement have tried so hard to combat for so many years.

As Solicitor General, Robert H. Bork was a strong friend of the civil rights movement. As I understand it, between 1973 and 1977, Solicitor General Bork represented the federal government in 20 substantive civil rights cases before the United States Supreme Court, and in 18 of those cases, he took the side of the civil rights plaintiff or the minority interest. In these cases, it is worth noting, the Justice most likely to accept the arguments advanced by Solicitor General Bork was Justice Brennan, who agreed with him in 17 out of 19 cases. Chief Justice Burger and Justice Rehnquist disagreed with Judge Bork more than any other Justices, and, indeed, rejected his arguments more often than not. Significantly, Justice Powell, whom Judge Bork has been nominated to replace, took positions less hospitable to the civil rights claim than those urged by Solicitor General Bork in a significant proportion of the civil rights cases argued during Solicitor General Bork's tenure. Similarly, in many instances, the argument advanced by Solicitor General Bork was broader than that which the Supreme Court was itself ultimately willing to accept.

Several of these cases have also been landmarks in the struggle for racial equality. In Runyon v. McCrary, 427 U.S. 160 (1976), for example, Solicitor General Bork successfully argued for the application of section 1 of the Civil Rights Act of 1866, 42 U.S.C § 1981, to a private party's racially discriminatory refusal to enter into a contract. It is worth noting that the rule of law that Solicitor General Bork successfully pressed in this case could have served as the basis for invalidating the racially restrictive covenant at issue in Shelley v. Kramer, 334 U.S. 1 (1948), for a restrictive covenant is a form of contract. Thus, it seems to me that those who have criticized Judge Bork for his theoretical criticism of the fourteenth amendment rationale in the Shelley case do him a disservice by not acknowledging his strong endorsement of eliminating racially restrictive covenants, his hostility to racial discrimination more generally, and the real and practical contribution that he made in Runyon and other cases in combatting racial discrimination.

Other instances of signinficant civil rights victories by Solicitor General Bork include Lau v. Nichols, 414 U.S. 563 (1974), a bilingual education case in which he persuaded the Supreme Court to adopt the dissenting opinion of Circuit Judge Shirley Hufstedler and to hold that Title VI reached actions discriminatory in effect. He also argued cases which made it easier for civil rights plaintiffs to use statistical evidence and proof of discriminatory effects in order to establish employment discrimination claims. See Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), moreover, Solicitor General Bork argued for broad congressional power to subject the States to money damages if they engaged in employment discrimination.

While there are numerous other examples of Solicitor General Bork's commitment to the principle of racial equality, this sample suffices to show his immense contribution to making that principle a reality. Indeed, and perhaps most significantly, in many of these cases (Runyon and Fitzpatrick, to name just two) Solicitor General Bork was filing briefs as a "friend of the court;" in other words, he did not not have to file the briefs he filed in order to defend the federal government in court, but he was persuaded by those in the Civil Rights Division that taking those postions was the right thing to do.

Since his appointment to be a Judge on the United States Court of Appeals for the District of Columbia Circuit, Judge Bork has clearly reaffirmed his commitment to the energetic enforcement of civil rights laws. In County Council of Sumter County v. United States, 696 F.Supp. 35 (D.D.C. 1984), for example, Judge Bork sat as a visiting judge on the local district court and joined a per curiam opinion strongly defending the voting rights of black citizens. Judge Bork held that a county had failed to prove that a new at-large voting system had neither the purpose nor the effect of diluting black voting strength. Not long ago, moreover, in Emory v. United States, 819 F.2d 291 (D.C. Cir. 1987), Judge Bork joined a per curiam opinion reversing a district court's decision dismissing a black naval officer's claim that the Navy had discriminated against him in refusing to promote him to Admiral. The D.C. Circuit's opinion held in strong terms that the sensitive, military decisions about the composition of the armed forces did not free the navy of its constitutional obligation to make such decisions in a nondiscriminatory manner. Judge Bork has also voted in several cases for the position that the federal law demands equal treatment of similarly situated male and female employees, whether in or out of government. See Palmer v. Schultz, 815 F.2d 84 (D.C. Cir. 1987); Laffey v. Northwest Airlines, 740 F.2d 1071 (D.C. Cir. 1984), cert. denied, 469 U.S. 1181 (1985); Csosky v. Wick, 704 F.2d 1264 (D.C. Cir. 1983). In all, Judge Bork has voted for the civil rights claimant in seven out of eight substantive civil rights cases that he has heard since his elevation to the appeals court.

Judge Bork's firm approach to the criminal laws is a matter that should be of interest to the civil rights community, for crime preys most savagely on the poor in our major urban centers. Judges who show excessive solicitude for the rights of criminals and not enough for the victims of crime do a disservice to all Americans, but particularly to the urban poor who bear the brunt of the enormous cost of rampant crime in our society. Judge Bork does not coddle criminals; rather, he applies the laws and Constitution in a fair and impartial manner. For example, Judge Bork believes that criminals should not be set free for technical errors by the police "[w]here no deterrence of unconstitutionl behavior is possible." See United States v. Mount, 757 F.2d 1315, 1323 (D.C. Cir. 1985) (Bork, J., concurring). Nor would Judge Bork ever stray from the plain terms of the Constitution to find that the States cannot apply the death penalty in order to deter commission of the most heinous crimes. But at the same time, Judge Bork has not hesitated to vote for the reversal of a conviction when he believes that that is what the law requires. See, e.g., United States v. Foster, 783 F.2d 1087 (D.C. Cir. 1986).

This all brings me to why I came here -- and I feel it important to note that I asked to appear on behalf of Judge Bork. I was watching these proceedings, and knowing what I know of Judge Bork's public record on civil rights and of his high quality as a lawyer, judge, and legal scholar, I asked myself why the opposition to Judge Bork from my colleagues in the civil rights community was so intense. It seems to me that we should be embracing this man instead.

It is true that in the past, he took some academic positions with which I and my comrades in the civil rights movement have strongly disagreed. But I know that many who opposed the Civil Rights Act of 1964 for considerably less noble reasons than the libertarian rigor that Professor Bork was pursuing have later become great allies of the civil rights movement.[1] People change, and Judge Bork has indicated his agreement with the civil rights laws by his actions and words for many, many years.

I also find it difficult to find fault with Judge Bork because of Professor Bork's theoretical disagreement with a Supreme Court case that invalidated a nondiscriminatory poll tax.[2] Nor can I get exercised by the fact that as a matter of theory, Professor Bork disagreed with the Supreme Court's opinion permitting Congress to use its constitutional power to remedy racial discrimination in order to outlaw nondiscriminatory literacy tests.[3] We all know that poll taxes and literacy tests are pernicious devices in general, and have often been used for ignoble and racist purposes. I would certainly have serious reservations about this nomination if Robert H. Bork had ever endorsed such devices as a matter of policy or if he had ever remotely suggested that discriminatory poll taxes or literacy tests were anything but unlawful. He has not, and, in fact, he has clearly stated that he would find discriminatory poll taxes or literacy tests unconstitutional under the fourteenth amendment.[4]

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[1] Indeed, Professor Bork was extremely careful to make it perfectly clear that he found racial discrimination morally reprehensible -- as he put it, a principle of "unsurpassed ugliness."

[2] See *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966).

Despite his record of public service, Judge Robert H. Bork has been roundly attacked by my colleagues. I believe, quite frankly, that he has become the victim of a rigid and selectively unforgiving civil rights movement orthodoxy to whom the results desired have become more important than the fair and impartial application of the law. My colleagues have chosen to ignore Judge Bork's remarkable record of concrete civil rights achievement and have latched onto and, in some cases, distorted, some of the man's ancient academic views in order to whip people into an irrational hysteria. To defeat him on this basis would be more than unfortunate.

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[3] See Katzenbach v. Morgan, 384 U.S. 641 (1966). Professor Bork's objection was to the notion that Congress could by majority vote overrule a Supreme Court opinion that had held nondiscriminatory literacy tests constitutional. That Judge Bork's position on this question is a matter of principle is clearly shown by his later opposition to using the same congressional power to redefine the human life as beginning at conception, which would have effectively overruled Roe v. Wade, 410 U.S. 113 (1973), which he had described as an "unconstitutional" decision.

[4] He also does not disagree with the Supreme Court decision upholding Congress' power to outlaw discriminatory literacy tests. See South Carolina v. Katzenbach, 383 U.S. 301 (1966).

At root, the reason for which I believe my colleagues wish to defeat Judge Bork, even unfairly, is, to me, a most unfortunate one. One of my colleagues put it well in saying that in the old days, to us, "the Supreme Court was the voice of God." It is true that many of us have looked to the courts to right the wrongs and fix the injustices heaped upon us by a tragic part of American history. But the wounds that the Court healed in the past several decades are not anything that Judge Bork has any desire to reopen, and I believe that my colleagues know that he would vigorously enforce the guarantee of equality in the Constitution and laws of the United States. More importantly still, we are now more in command of our own destinies, and need not rely so strongly on the benevolence of five judges to make our advances.

What is upsetting my colleagues, I believe, is the notion that Judge Bork's exercise of judicial restraint will not guarantee the results that many of them want irrespective of what the Constitution and the law requires. The tragedy of this misguided view is that this desire for an activist judiciary clearly shows how out of touch much of the civil rights movement is with the problems facing black Americans in the 1980s. Rampant crime, inadequate education, single-parent families, teenage unemployment, AIDS, and drug abuse, unlike desegregation and equal employment opportunities, are not problems that can be solved by even the most activist judiciary. It will take the patient and dedicated efforts of the black community, church groups, the government, and society in general to meet the serious challenges facing black Americans today. Reliance on the Supreme Court to solve these problems for us is both foolish and sad.

As for the courts, I believe that black Americans, like all Americans, will be best served by courts staffed by judges who will apply the laws with honesty, impartiality, and fairness. It is for this reason that I strongly support the confirmation of Judge Robert H. Bork to be an Associate Justice of the United States Supreme Court.

I commend highly Professor Thomas Sowell and attorney Jewel LaFontant for testifying at these hearings in support of Judge Bork. In the past one had to have courage to fight wrongs from outside of the community. Today, one has to have strength and courage to combat evil from within our community. We must beware of the arrogance of early conversions. Late, deliberately arrived at conversions often are better.

Senator **Metzenbaum**. Thank you, Mr. Innis.

Senator **Specter**. Mr. Chairman, I wonder if I might ask one question at this point because I have a commitment that I have to go to.

Senator **Metzenbaum**. If Senator Thurmond has no objection, I have none.

He wants to ask one question.

Senator **Specter**. If you would yield for a single question at this point.

Senator **Thurmond**. Yes. Go ahead.

Senator **Specter**. I am very interested in your testimony, Mr. Innis. The sole question that I have for you is whether you have any concern about the consistency of Judge Bork's writings prior to the time that the hearing started on the equal protection clause, where he had taken the position that equal protection as a matter of original intent to the framers was limited to racial issues, and then more recently had said that it applied as well to ethnic considerations, but at this hearing said that he now regarded equal protection as applicable to women, to illegitimates, to indigents, and the broad range of rights comprehended by court decisions.

And my question for you is, do you have any concern that for so much of his professional career, up until the time he testified here, he had limited equal protection to just race and ethnics?

Mr. **Innis**. I am impressed, Senator, with Judge Bork's ability to learn and to be flexible and to rethink his position. I think that is a very good thing. I think we can look from the time he was a provocative professor at Yale to becoming the Solicitor General to the federal judge to even this hearing we have seen growth. I do not see any strange deviation. I see growth, and I think that is positive.

We, in the civil rights movement, I think should take some credit for that. It is my feeling that the only person that I know of who was in public life who had been completely consistent on civil rights and other matters was Hubert Humphrey. Everybody else is a late convert.

Senator **Specter**. Thank you very much, Mr. Innis. Thank you, Mr. Chairman. And thank you, Senator Thurmond, for yielding.

Senator **Metzenbaum**. Mr. Innis, would you support Judge Bork in his criticism of the Supreme Court's decision with respect to the issue of one man, one vote?

Mr. **Innis**. No, I do not. But again, I do not want to quibble with which of Judge Bork's position I agree or disagree with. I have heard the best legal scholars in America before this committee.

Senator **Metzenbaum**. You think it would be a quibble? How many blacks do you think would be holding public office today in the South if the one man, one vote decision had not remained the law and had been changed as Judge Bork would have changed it?

Mr. **Innis**. I think America would be a very different place, and I think Judge Bork himself has said that he had seen now from practice, from these changes, from the 1964 civil rights bill, from other developments coming out of the 1960's, he has seen that America is a better place for it.

Senator **Metzenbaum**. Do you agree with his criticism of the Supreme Court in upholding the constitutionality of the public accommodations law?

Mr. INNIS. I think he has changed his position on that. To our credit in the movement. I will say again that we, in the movement, should take great pride in the fact that Judge Bork and many others have changed their position in that.

Senator METZENBAUM. Would you agree with his position with respect to his criticism of the Supreme Court for its decision outlawing restrictive covenants? Does that bother you at all?

Mr. INNIS. Many things, many of the academic positions taken by Judge Bork before becoming the Solicitor General and before becoming an appellate judge bother me tremendously. At the same time, I have studied his record as the Solicitor General and his various amicus briefs, and I am very impressed with his faithfulness to civil rights. And I am very impressed with his rulings as a judge on the appellate bench.

Senator METZENBAUM. Thank you, Mr. Innis.

Senator Thurmond?

Senator THURMOND. Mr. Innis, I am very glad to see you and very glad to have you here. Is it your opinion if Judge Bork is confirmed for the Supreme Court that he would be fair to black people?

Mr. INNIS. Yes. I think he would bring a vigorous debate to the Court, and I believe that he will be very much influenced not just by those members of the Court who will share his particular philosophic persuasion but by all the members of the Court.

Senator THURMOND. Professor Ronald Davenport, of Duquesne University, Thomas Sowell, of the Hoover Institute, and Jewel La Fontant, Deputy Solicitor General under Judge Bork—all black people—all testified the same way: that they felt that he would be fair to black people.

There have been charges by some that he wouldn't be fair to black people and fair to women and fair to this and that, and there is really no basis for that now, is there? Under the decisions he has handed down, his actions as Solicitor General, and under decisions he has handed down in the court, and that is the real test, that is the result. That is the actions he took as a judge.

He wrote 150 decisions, participated in 400 decisions. In not a one of them has he shown any inclination not to be fair to blacks or women, has he?

Mr. INNIS. That is true. In fact, I am very impressed with the testimony of Attorney Jewel La Fontant, who worked for Judge Bork as Deputy Solicitor General. And I was impressed with her testimony as a black and also as a woman as to his fairness to her from personal knowledge.

Senator THURMOND. I just want to ask you this question. Do you know of any reason why we should not confirm Judge Bork with this fine record here as Solicitor General and on the circuit bench? In spite of when he was teaching if he carried on provocative or controversial discussions or wrote things that were controversial, do you know of any reason?

And, as you say, time has changed, progress has come, and you are satisfied with the man's actions as Solicitor General and on the circuit court, aren't you?

Mr. INNIS. I am. And let me say that, if he is not confirmed because of the hysteria and the disinformation campaign as stated by

Chief Justice Warren Burger and others, it will be a disservice to this institution and to the country.

Senator **Thurmond**. Now I want to ask you this direct question. Do you feel that Judge Bork is qualified by reason of his integrity, his judicial temperament, and his professional qualifications and competence, because of the courage he has shown in decisions he has written, the dedication to duty, and being such a fine scholar with a very imaginative mind—do you feel he will make an excellent Supreme Court Justice of the United States or not?

Mr. **Innis**. I do. And let me say that I am impressed with the fact that even his opponents are equally impressed with his integrity. And when he made a commitment to this committee as to his position and the re-evaluation and reassessment of his old position, I believe he will stick to that commitment.

Senator **Thurmond**. Therefore, I assume that you recommend that the Senate confirm him.

Mr. **Innis**. I do so.

Senator **Thurmond**. Thank you very much.

The **Chairman**. The Senator from Alabama?

Senator **Heflin**. Mr. Chairman, I just received a message that I have some constituents from Alabama that have come up here to see me, so I will refrain from asking any questions and visit with my constituents.

The **Chairman**. Thank you very much. Thank you for coming, Mr. Innis. Appreciate it very much.

Our next panel will be composed of two witnesses who are members of what is referred to as the Pocketbook Coalition, a coalition of consumer and small business groups: Mr. Daskal—I hope I pronounced that correctly—the Chairman of the Pocketbook Coalition, and counsel for the Service Station Dealers of America; and Mr. Albert Foer, chairman of Melart Jewelers—I am probably mispronouncing that—and former lawyer with the Federal Trade Commission.

Would you both stand to be sworn, please?

Do you swear the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Daskal**. I do.

Mr. **Foer**. I do.

The **Chairman**. Thank you very much, gentlemen. If you will proceed in whichever order you would prefer; and, again, please try to keep your comments to 5 minutes. It would be much appreciated.

Excuse me. I beg your pardon. Before you begin, the Senator from Ohio asked for a few minutes prior to this testimony.

Senator **Metzenbaum**. Thank you very much.

There were a couple of things that occurred this morning when I couldn't be here, I was on the floor of the Senate.

One, my colleague, Senator Simpson, I think made the argument with the Rabbi witness, I don't know his name, that people were accusing Bork of anti-Semitism. As one who would be particularly sensitive to that issue, I want to say that I know of no evidence to that effect. I know of no claim that has been made to that effect, and I want to put that kind of a statement to rest as promptly as possible.

I may have reasons to disagree with Judge Bork and whether he should or should not be confirmed, but any claim of anti-Semitism is not a factor in that consideration.

And then Senator Grassley mentioned that I had stated at the time that Judge Bork was up and had referred to a statement I made when Justice O'Connor was up before us for confirmation and that I had indicated that my views might differ from hers with respect to any one of a number of different issues.

I made that suggestion with respect to the antitrust matter when Judge Bork was before us. I might say that if the only issue were antitrust, and there were a difference of opinion, that might be one thing. But there are so many different issues having to do with equal protection for women, and the right of privacy, and the protection of minorities, freedom of speech, executive power, access to courts for citizens, basic approach to the Constitution, as well as a number of other concerns that the same approach cannot be taken because it isn't any one of them.

There's no secret about it, that when Justice O'Connor came before us for confirmation one of the main issues had to do with the case of *Roe* v. *Wade*. And I think it's also fair to say that when Justice O'Connor and Justice Scalia came before us there was no evidence that either of them had a record showing hostility to a long line of Supreme Court decisions.

In this case I think the record not only shows hostility but a willingness—almost an avid enthusiasm—to overrule precedent. And so I'm sorry my colleague, Senator Grassley, is not with us at the moment, but I did want, before this hearing concluded, to respond to that comment that had been made, and I thank you, Mr. Chairman, for your patience.

The **Chairman**. Thank you. And before we interrupt any other witnesses, Senator Thurmond and I have been discussing here, and for those who may have some interest—and I would ask Senator Thurmond to comment on this—we have a scheduled executive committee meeting for tomorrow.

We are going to cancel that meeting, schedule the executive committee markup for 2:00 o'clock on Tuesday, next Tuesday, at which time there will be a vote on the nomination of Judge Bork, and there will be—I ask unanimous consent that there be no motion to carry over the nomination for another week, which would be the right of individual Senators.

So if I have agreement from the ranking member, and my colleagues—I believe all the Democrats are in agreement—that we will begin discussion at 2:00 on Tuesday next, October the 6th, at which time we will vote on the nomination of Judge Bork, and there will be no motion in order to hold over the nomination in executive session for a week, which is ordinarily the right each Senator has.

And the Senator suggests I would move that we begin the meeting at 2:00, and that we vote no later than 5:00. I hope we vote within the first half hour.

Senator **Metzenbaum**. Mr. Chairman, I have no objections to that procedure, but I'm thinking that if I were not present and did not know that you were going to make that unanimous consent request, whether or not I might in some way feel put out.

I would like to suggest to you that both you and Senator Thurmond, respectively, check with the other members on each side very promptly to be certain that they have no objection to you asking this.

The **Chairman**. We will do that. That's a good suggestion; we will do that, and if there is no further comment by the Chair by 5:00 o'clock today it can be assumed we have gotten all of them to agree.

Now, I apologize for our business getting in your way, gentlemen, but would you please proceed.

TESTIMONY OF A PANEL CONSISTING OF DIMITRI G. DASKAL AND ALBERT A. FOER

Mr. DASKAL. Senator Biden, I would like to start with a brief disclaimer that, although I am one of the counsel to the Service Station Association, I'm wearing the hat of the chairman of the Pocketbook Coalition, not appearing as counsel.

The CHAIRMAN. You are not appearing on behalf of the Service Station Owners?

Mr. DASKAL. I am appearing on behalf of the Pocketbook Coalition, which is a bipartisan group of businesses, executives and consumer groups that oppose the confirmation of Judge Bork.

The CHAIRMAN. What is that word that you're using, "pocket"——?

Mr. DASKAL. Pocketbook Coalition. Pocketbook, like "purse."

The CHAIRMAN. Thank you very much.

Mr. DASKAL. Yes, Sir. Our opposition is based on his writings, and most importantly his record as a judge in the area of antitrust law. We believe that if Judge Bork is confirmed we all, quite literally, will pay the price.

The harm to consumers that would occur if Justice Bork were to be permitted to implement an activist antitrust philosophy is most vividly demonstrated in the area of resale price maintenance, better known as vertical price-fixing by manufacturers and distributors.

In 1975, when this committee reported legislation repealing the Fair Trade laws, which it termed as legalized price-fixing, its study found that the practice caused consumers $2.1 billion per year.

In the area of shoes and clothes alone, American consumers saved $4 billion in 1986 by being able to purchase name-brand goods at off-price retailers.

While American consumers vote for off-price retailing with their feet and with their pocketbooks, Judge Bork maintains that consumers would be better served by having to purchase at stores at full manufacturer retail price which, in his view, provides superior service. This so-called "free ride" myth is exploded by the fact that 83 percent of those who shop at discount off-price stores cite superior service as one of the major reasons they shop these stores.

Judge Bork tells the nation's 60,000 independent gasoline retailers they should not be legally free to set prices at their stations. In the appendix to his chapter on price-fixing in, "The Antitrust Paradox," he writes, and I quote:

"A line of Supreme Court cases has destroyed refiners' ability to set stations prices and thus destroyed this efficiency."

Thus, under his view, gasoline prices in Birmingham, Alabama, could legally be set by corporate managers in Houston, Texas, rather than by local businessmen in competition with each other.

His views in the areas of mergers are equally trouble-some. In the area of horizontal mergers, a major driving force behind the enactment of the Sherman Act, one could reassemble the original Standard Oil Trust. Thus Exxon, Chevron, Mobil, Marathon and Amoco could merge into a new Standard Oil, which could then legally dictate gasoline prices across the country.

Similarly, several of the nation's largest department stores could merge, and discounters could be denied access to products most desired by consumers, simply on their whim. We submit that to allow such results under the guise of implementing the original intent of the framers of the Sherman Act and other antitrust laws would be truly perverse.

Judge Bork goes further than other conservative scholars in stating that all vertical restraints of trade should be held always legal. In the last Congress, when the Justice Department issued its vertical antitrust guidelines, which were much more liberal than Judge Bork's view, Congress reacted by passing House Resolution 303, which stated that these guidelines were not an accurate statement of the law.

An example of the harm that consumers could possibly suffer by vertical restraints is demonstrated by exclusive dealing contracts.

In 1986, when crude oil prices dropped rapidly, oil companies dramatically dropped prices to wholesalers, but did not pass on the full price cuts to direct-serve retailers who were tied in by exclusive dealing contracts. The retailers were able to purchase the identical branded product 15 to 30 cents per gallon cheaper from wholesalers, but were threatened with termination if they did so.

These practices, which would pass Judge Bork's antitrust scrutiny, cost American voters $1 billion, according to a study by the Citizens Energy/Labor Coalition.

We ask, how is the interest of the American consumer served by denying him or her access to lower prices? Why should blue-jeans, shampoo, candy, compact disc players, cost the same in every store in our cities and towns?

Consumer welfare is not what Judge Bork defines it as--the benefits of economic efficiency trickling down to consumers through corporate largess. Consumer welfare is enhanced when Americans of our nation are free to decide what mix of prices and services he or she wishes in their stores.

Judge Bork's oft-quoted statement that a court that understands economic theory is free to state that a practice Congress thinks harms competition actually does not, is something that gives us great concern.

Should Supreme Court justices be free to circumvent the clear intent of Congress based as what they see as their superior, enlightened economic wisdom? We think not.

Economic concentration was decried by Founding Fathers such as Thomas Jefferson and the authors of our antitrust laws. We believe that Judge Bork's confirmation would lead to increasing economic concentration: therefore, we oppose that confirmation. Thank you.

[The statement of Mr. Daskal follows:]

Statement of Jim Daskal, Chairman, The Pocketbook Coalition

Mr. Chairman, members of the committee, my name is Jim Daskal, I am here as Chairman of The Pocketbook Coalition, a bipartisan group of businesses, executives and consumer groups opposed to the confirmation of Judge Robert Bork to the Supreme Court on the basis of his writings and record as a judge in the area of antitrust law.

We believe if Judge Bork is confirmed, we all quite literally will pay the price. The harm to consumers that would occur if Justice Bork were to be permitted to implement his activist antitrust philosophy is most vividly demonstrated in the area of vertical price fixing by manufacturers and distributors.

While American consumers vote for off-price retailing with their feet and their pocketbooks, Judge Bork maintains that consumers would be better served by having to purchase at stores that sell at full manufacturer's suggested price, which in his view provide superior services. The "free-ride" myth is exploded by the fact that 83% of off-price shoppers cite superior services such as convenient and timely availability of the goods they desire as major reasons to shop off-price.

Judge Bork tells the nation's 60,000 independent gasoline retailers they should not be free to set prices at their stations.

In Judge Bork's view, gasoline prices in Birmingham, Alabama should be set by the refiners' corporate managers in Houston, Texas, rather than local businessmen in competition with each other.

Judge Bork is equally sanguine about other vertical restraints, all forms of which he believes should be held always legal.

An example of the harm consumers would suffer under such a system of law occurred in 1986 when crude oil prices collapsed. Oil companies dramatically dropped prices to wholesalers, but did not pass on the full price cuts to their direct served retailers who were tied in by exclusive dealing contracts. The retailers were able to purchase the identical branded product 15-30 cents per gallon cheaper from wholesalers but were threatened with termination if they did so. A study by The Citizens Labor/Energy Coalition revealed that these practices, which Judge Bork would bless, cost American motorists $1 billion.

Judge Bork's views on mergers are equally troublesome. Under his view of the law of horizontal mergers, the major companies of the Standard Oil Trust, one of the major evils that the Sherman Act was intended to address, could be reassembled. Thus, Exxon, Chevron, Mobil, and Amoco could merge into a new Standard Oil, which could then dictate gasoline prices across the country.

We submit that to allow such a result under the guise of implementing the original intent of the framers of the Sherman Act and our other antitrust laws would be truly perverse.

Consumer welfare is enhanced not when big business enjoys efficiencies, but rather when Americans are permitted to exercise the freedom to decide what mix of price and services they wish to buy and sell. Consumers are not served when they are denied access to lower prices, or when they are stuck with a distribution system that requires them to pay the same prices for blue jeans, shampoo, candy, and Walkmans no matter where they shop.

Should Supreme Court Justices be free to circumvent the clear intent of Congress based on what they see as their superior, enlightened economic wisdom? We think not.

A vote for Judge Bork is a vote against the American consumer and a vote for the economic concentration and the attendant evils that a century of antitrust law has attempted to abate.

Thank you for this opportunity to share our views.

APPENDIX 1

PRICE FIXING (RPM)

EFFICIENCIES FROM PRICE-FIXING AGREEMENTS

The efficiencies that may be achieved by a price-fixing agreement include:

(1) Optimizing local sales effort (the "free ride" problem);
(2) Optimizing local sales effort (product uniformity);
(3) Reinforcing a market-division agreement;
(4) Providing the mechanism for the transfer of information;
(5) Assisting the achievement of advertising economies of scale;
(6) Protecting one party to a joint venture against the fraud of the other; and
(7) Breaking down reseller cartels and preventing the misuse of local reseller monopolies.

LOCAL SALES EFFORT: THE "FREE RIDE" PROBLEM

Price fixing can be a method of eliminating free rides in either a vertical or a horizontal contract integration. The argument is very similar to that made in connection with market division. When prices are fixed, no purchaser is able to obtain the information he wants from one seller and then purchase from another at a lower price. Each seller of the brand, therefore, is free to provide the optimal amount of selling effort without fear of a free rider. Where the seller's price is maintained, he is forced by rivals, whether offering the same or other brands, to compete by other means, and this forces him to provide the local sales effort desired by the manufacturer or the group to which he belongs. Market division has the same effect where there is rivalry from other brands. Price fixing is likely to be preferred to market division as the means of attaining this efficiency in situations where effective marketing requires thorough coverage of an area through numerous sellers rather than use of a single outlet.

LOCAL SALES EFFORT: PRODUCT UNIFORMITY

Even where the free ride is not possible because the provision of sales effort and services necessarily occurs at the time of and in conjunction with the sale, price fixing may be an important means of ensuring the provision of sales effort and services. A good example is the provision of services in conjunction with the sale of gasoline. The importance of sales effort in such markets is too often overlooked, but it is clearly present. Much national refiner advertising of gasoline stresses the extra services, conveniences, and courtesies that the local dealers provide. That there is a real concern about this local sales effort is demonstrated by the common refiner policy of instructing their dealers about such matters and policing dealer performance.

The attempt to ensure the provision of such services seems to account, in part, for the persistent efforts of refiners to control the prices charged by their dealers. The question that naturally arises, however, is why refiners do not allow individual dealers to determine for themselves whether a price or a service appeal would be most effective in their particular markets. The answer may be twofold. The refiner may feel that its marketing acumen is significantly greater than that of the general run of the people it can attract as dealers. More important, perhaps, is the fact that a large part of the refiner's brand appeal to motorists rests on the uniformity of the product sold at its stations. This uniformity does not depend on the physical qualities of the gasoline alone. The station also offers a number of services that may be classified as local sales effort: the availability and cleanliness of washroom facilities; the cleanliness of the station and the neatness of the attendants; the politeness or geniality with which service is given; the giving of travel directions; the availability of a range of services for the car (lubrication, tire and battery replacement, and minor repairs); recognition of credit cards; and the provision, often without being asked, of such free services as wiping windows, checking the pressure of tires, pumping air into tires, checking water and oil levels, etc. These are as much a part of the product sold and paid for as is the gasoline.

Since consumers of gasoline are mobile, they will patronize many different dealers. A refiner wishing to appeal to those consumers who value a high degree of service must establish the uniformity of his product, so that consumers can rely on getting approximately the same combination of physical product and services at any station carrying the brand. The deviation of any significant number of stations from the product standard will lessen the effectiveness of the refiner's advertising and reduce the appeal that uniformity makes in itself. A line of Supreme Court decisions has destroyed the refiners' ability to control station prices, and has thus destroyed this efficiency.[7]

REINFORCEMENT OF MARKET DIVISION

Market division may tend to break down where the parties to the agreement sell to resellers. In a system like Sealy's, the existence of wholesalers or retailers would make the territorial division hard to police, and it would be difficult to know whether the manufacturer whose reseller sold across territorial lines had given a lower price with that end in view. The market division could be reinforced either by an agreement on the prices at which the member manufacturers should sell to resellers or by an agreement that the manufacturers should maintain the resale prices of their resellers. The Sealy group did agree to maintain resale prices, and there are some indications in the record that this served to reinforce the manufacturers' market-division agreement. This reinforcement, of course, involves the "aggregation of trade restraints" that the Supreme Court found offensive, but such reasoning is beside the point. If any of the restraints is harmful, it should be unlawful regardless of its "aggregation" with others. If all the restraints are merely methods of creating efficiency, then their "aggregation" merely enhances their beneficial effect.

TRANSFER OF INFORMATION

The suggesting or setting of prices is a means of transferring information about proper market behavior from those whose competence or information is suness of these issues consists of their high yield and their tax exempt status. For some time, advocates of "tax reform" have spoken of their desire to see the latter "shelter" removed. Title II of this bill will give this movement a powerful impetus.

I am convinced that should this occur the effect on local governments' financing would be disastrous. Bond issues would go begging for purchasers. The spector of default would loom over hundreds of our cities, and scores of states. And the guarantee provisions of Title I would be brought into play, with the Federal government finally bailing out everyone.

I have sympathy for the people of New York. But that sympathy does not extend to supporting legislation whose precedents I fear will visit New York's plight upon countless other towns. State and local bonds have been free from taxation almost as long as they have been in existence. Tinkering with that fine system is ruinous fiscal policy. This bill should be defeated.

William M. Ketchum.
Donald D. Clancy.

CONSUMER GOODS PRICING ACT OF 1975

P.L. 94-145, see page 89 Stat. 801

House Report (Judiciary Committee) No. 94-341,
July 9, 1975 [To accompany H.R. 6971]

Senate Report (Judiciary Committee) No. 94-466,
Nov. 20, 1975 [To accompany H.R. 6971]

Cong. Record Vol. 121 (1975)

DATES OF CONSIDERATION AND PASSAGE

House July 21, 1975

Senate December 2, 1975

The Senate Report is set out.

SENATE REPORT NO. 94-466

[page 1]

The Committee on the Judiciary, to which was referred the bill (H.R. 6971) to repeal exemptions in the antitrust laws permitting State fair trade laws, having considered the same, reports favorably thereon, and recommends that the bill be passed.

Purpose

The purpose of the proposed legislation is to repeal Federal antitrust exemptions which permit States to enact fair trade laws. Such laws allow manufacturers to require retailers to resell at a price set by the manufacturer. These laws are, in fact, legalized price-fixing. They permit competing retailers to have identical prices and thus eliminate price competition between them. Repeal of the fair trade laws should result in a lowering of consumer prices.

This proposed legislation repeals the Miller-Tydings Act which enables the States to enact fair trade laws and the McGuire Act which permits States to enact nonsigner provisions. Without these exemptions the agreements they authorize would violate the antitrust laws.

SUBSTITUTION OF H.R. 6971 FOR S. 408

A bill to repeal fair trade enabling legislation (S. 408) was introduced in the Senate in January 1975 by Edward Brooke (R-Mass.) and was passed unanimously from the Antitrust and Monopoly Subcommittee on May 5. Before this committee was able to consider S. 408, the House of Representatives passed H.R. 6971 which is identical to S. 408, except for the title of the bill. This committee voted to substitute H.R. 6971 for S. 408 in order to expedite passage of this

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legislation. Without the substitution S. 408 would have had to be considered by the House after the Senate passed it. The substitution permits the bill to go directly to the President for consideration after passage by the Senate.

STATEMENT

Fair trade laws permit a manufacturer to enter into an agreement with a retailer setting the minimum or stipulated price at which his product may be sold. California passed the first State law in 1931 and other States followed. It became apparent, however, that any state law which applied to interstate commerce violated Federal antitrust laws. Thus, in 1937, Congress passed the Miller-Tydings Act granting State fair trade laws an exemption from the Sherman Antitrust Act. Some manufacturers attempted to set the resale prices not only of retailers who had signed fair trade contracts but of retailers who had not done so. In 1951, the Supreme Court in *Schwegmann Bros. v. Calvert Distillers Corp.*, 314 U.S. 384 ruled this practice illegal. Congress rectified the situation in 1952 by enacting the McGuire Act which permitted States to pass fair trade laws with nonsigner clauses. However, the fair trade contract could be enforced against a nonsigner only as long as the manufacturer procured the signature of at least one retailer to a contract.

At the time S. 408 was introduced, 13 States had fair trade laws with nonsigner provisions and 23 States had fair trade laws without nonsigner provisions. The States with nonsigner provisions were Arizona, California, Connecticut, Delaware, Illinois, Maryland, New Hampshire, New Jersey, New York, Ohio, Tennessee, Virginia, and Wisconsin. The States with fair trade laws without nonsigner provisions were Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Washington, and West Virginia. By November, 15 of those States had repealed their fair trade laws. They are: Arkansas, California, Colorado, Connecticut, Florida, Iowa, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Tennessee, and Washington.

The principle products fair traded are stereo components, television sets, major appliances, mattresses, toiletries, kitchenware, watches, jewelry, glassware, wallpapers, bicycles, some types of clothing, liquor, and prescription drugs.

Liquor will not be affected by the repeal of the fair trade laws in the same manner as other products because the Twenty-First Amendment to the Constitution gives the States broad powers over the sale of alcoholic beverages. Thus, while repeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices, alcohol manufacturers may do such in States which pass price fixing statutes pursuant to the Twenty-First Amendment.

Seven days of hearings were held in the Senate. Six of those days were hearings on the bill proper. The seventh concerned an amendment proposed by several newspapers to amend the bill to permit newspapers to set maximum retail prices. The amendment was not brought to a vote because of lack of support for it.

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Repeal of the fair trade laws was called for by President Ford, consumer groups, the Justice Department, the Federal Trade Commission, the Council on Wage and Price Stability, discount stores and smaller business associations. Editorials in newspapers across the country unanimously favored repeal.

Opponents were primarily service-oriented manufacturers who claimed retailers would not give adequate service unless they were guaranteed a good margin of profit. However, the manufacturer could solve this problem by placing a clause in the distributorship contract requiring the retailer to maintain adequate service. Moreover, the manufacturer has the right to select distributors who are likely to emphasize service.

While small business groups did not testify, a couple submitted statements expressing fear that there would be vicious price-cutting without fair trade. No evidence was presented to indicate that there were destructive predatory practices in states which had repealed fair trade laws. Nor were there bad effects in Canada which repealed its fair trade laws in 1957 or in Great Britain which repealed such laws in 1965. A study published in 1969 reports small retailers were not driven out of business and predatory price cutting was rare in the 4 years following repeal in Great Britain. Similar experiences have been reported in Canada.

Moreover, statistics gathered by the Library of Congress indicate that the absence of fair trade has not harmed small business. Using Dun and Bradstreet data, the Library of Congress found the 1972 firm failure rate in "fair trade" states which have the nonsigner provision was 35.9 failures per 10,000 firms, in "fair trade" States without the nonsigner provision the rate was 32.2 failures per 10,000 firms, while the failure rate in free trade States averaged 23.3 failures per 10,000 firms—in other words "fair trade" States with fully effective laws have a 55 percent higher rate of firm failures than free trade states.

Finally, the traditional argument that fair trade protects the "mom and pop" store from unfair competition is not borne out by statistics. Between 1956 and 1972 the rate of growth of small retail stores in free trade States (including states which repealed "fair trade" during this period) is 32 percent higher than the rate in "fair trade" States.

Fair trade laws are in fact legalized price-fixing. They permit competing retailers to have identical prices and thus eliminate price competition between retailers.

Studies by the Department of Justice which were cited in a 1969 Economic Report of the President, indicate that the consumer would be saved $1.2 billion a year by the elimination of the fair trade laws. Updated for inflation this figure comes to $2.1 billion. Another study of the Department of Justice estimated that fair trade laws increase prices on fair traded goods by 18–27 percent. For example, a set of golf clubs that lists for $220 can be purchased in non-fair trade areas for $136; a $49 electric shaver for $32; a $1,360 stereo system for $915 and a $560 19-inch color television for $483.

The repeal of the fair trade laws does not affect the use of suggested prices by a manufacturer. However, the use of suggested prices in such a way as to coerce adherence to them would be illegal.

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ADDITIONAL VIEWS OF SENATOR STROM THURMOND (R–SC) ON H.R. 6971, A BILL TO REPEAL ENABLING LEGISLATION FOR FAIR TRADE LAWS

The question should be raised as to whether it is desirable to pass Federal legislation to repeal existing fair trade laws. Under the Miller-Tydings Act and McGuire Act, the respective States are not required to enact fair trade laws and nonsigner provisions, but are merely given the opportunity to do so if they wish. Congress has permitted the States to enact fair trade laws since 1937, almost forty years ago, and reinforced that right in 1952.

I firmly believe in the fulfillment of the spirit, as well as the letter, of the Constitution of the United States regarding the Tenth Amendment's preservation of the powers and the rights of the States and the people. Some years ago, I strongly opposed the effort on the Federal level to impose a national fair trade law upon this Country. I remain concerned that the separate States be allowed to make decisions regarding fair trade laws to the greatest extent possible.

In view of my respect for the integrity of the individual States, I have given careful thought to whether the Federal Government should supplant the judgment of the States in this area. In considering this matter, I have been aware the States have not been completely insensitive to the need to make changes in this area as shown by the fact that a number of States in recent years have moved to repeal their fair trade laws.

After careful thought and analysis, I conclude that I will not dissent from the decision of this Committee to favorably report H.R. 6971. A review of the record indicates repeal of the fair trade laws in the various States should be in the best interest of the Country. Lower prices should be available to consumers, and a substantial contribution should be made in the effort to control inflation.

On balance, it appears the positive benefits produced by this legislation should outweigh any negative effects it would have. I have concluded that it is less objectionable to enact legislation disallowing fair trade laws than it is for the Congress to continue to sanction price fixing that results from the existence of fair trade laws.

Shell Spurts to the Top. . . .

Shell Oil Co. spurted to the top of the pile in 1986 and became the nation's No. 1 marketer of gasoline. It had been fourth in 1985 but had been as high as second in prior years.

Shell, with a 20.4% increase in volume last year, vaulted over Chevron, Texaco and Exxon—in that order—in finally nailing down a title that had been sort of a will-of-the-wisp target through the years.

Probably the biggest single thing that enabled Shell to fly so high in 1986 was its acquisition of 400 service stations in the Northeast from Arco during the latter's planned withdrawal from eastern marketplaces. Virtually all of the stations were big volume outlets in prime locations.

Shell said its service stations enjoyed an 11% increase in sales in 1986, the best performance record of any of the top companies in that period. Next biggest increase, percentagewise, was Mobil with 9.9%. But Mobil's included both service stations and other sales so this is not necessarily a quid pro quo comparison.

There were two other significant changes in the line-up of the top 15 gasoline marketing companies: Standard Oil Co., formerly Sohio, moved up one notch passing fading Arco in the process, and Marathon was added to the top 15 for the first time.

In bygone years, Marathon had been rather reluctant to release its gasoline volume details so it was hard to get a good fix on where it stood nationally. Now, however, Marathon is ranked ninth based on its sales of more than 4-billion gal. of gasoline in 1986. It also inserts Marathon ahead of Unocal, Sun and Phillips.

Shell, in taking over first place, bumped Chevron which had held the leadership since its late 1983 acquisition of the old Gulf Oil Corp. At that time, Chevron made an equally spectacular leap upwards, going from fifth to first in one fell swoop.

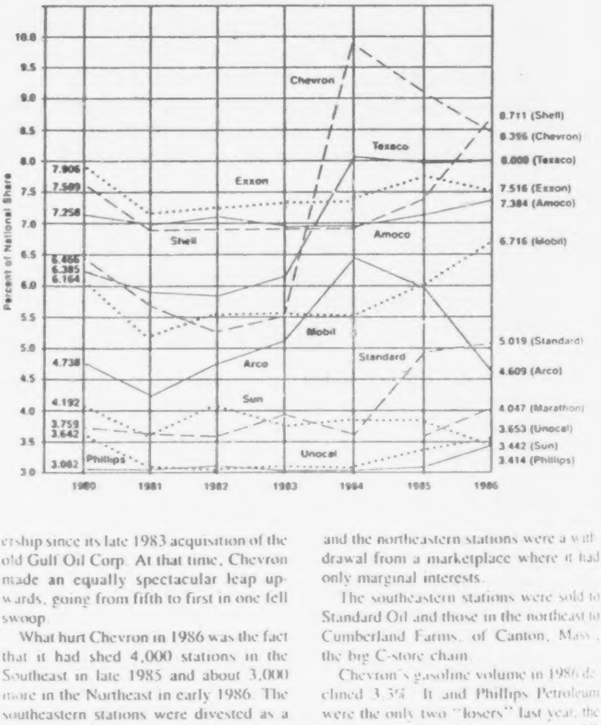
What hurt Chevron in 1986 was the fact that it had shed 4,000 stations in the Southeast in late 1985 and about 3,000 more in the Northeast in early 1986. The southeastern stations were divested as a result of a court order in the Gulf merger and the northeastern stations were a withdrawal from a marketplace where it had only marginal interests.

The southeastern stations were sold to Standard Oil and those in the northeast to Cumberland Farms, of Canton, Mass., the big C-store chain.

Chevron's gasoline volume in 1986 declined 3.3%. It and Phillips Petroleum were the only two "losers" last year, the Bartlesville, Okla., firm reporting a 1.2%

THE BIG PICTURE

By Market Share



Gross Gallonage and Relative Shares of 15 Companies—1986-85

	1986 (total sales = 109,105,160,000 gal.)				1985 (total sales = 108,876,519,000 gal.)			
	Rank	% Mkt. Shr.	(Add 000) Gallonage	% Chng '86 vs. '85	Rank	% Mkt. Shr.	(Add 000) Gallonage	% Chng '85 vs. '84
Shell	1	8.711%	9,504,600	20.4%	4	7.251%	7,894,500	8.0%
Chevron	2	8.396	9,160,020	(3.3)	1	8.702	9,473,940	(8.4)
Texaco	3	8.009	8,738,100	1.8	2	7.885	8,584,800	(8.8)
Exxon	4	7.516	8,200,800	—	3	7.589	8,262,870	4.9
Amoco	5	7.384	8,017,590	2.6	5	7.181	7,818,300	6.0
Mobil	6	6.716	7,327,740	9.9	6	6.125	6,668,500	12.7
Standard	7	5.019	5,475,480	3.7	8	4.914	5,350,170	(13.0)
Arco	8	4.609	5,028,210	8.3	7	4.266	4,644,990	(32.7)
Marathon	9	4.047	4,415,040	5.9	9	3.830	4,169,760	NA
Unocal	10	3.653	3,985,800	7.0	11	3.421	3,725,190	2.3
Sun	11	3.442	3,755,850	2.9	10	3.450	3,648,540	(11.5)
Phillips	12	3.414	3,725,190	(1.2)	12	3.365	3,663,870	9.6
Conoco	13	2.740	2,989,350	3.7	13	2.647	2,882,040	NA
Southland	14	1.879	2,050,000	3.5	14	1.819	1,980,000	NA
Getty	15	1.096	1,195,740	8.3	15	1.014	1,103,760	NA
Total	—	76.6 %	83,569,510	5.2%	—	73.1 %	79,571,230	(NC)

* The gross gallonage used in all four tables is that reported by the various companies in their annual reports as having been gasoline manufactured and sold by them during the calendar year to all sources, including inter-refinery sales. Some companies concede that the gasoline volumes may include small amounts of other products, such as avgas, naphtha, etc. These additions are not considered to be significant, however. (a) In connection with the 1984 and 1983 tables, Gulf was acquired by Chevron in 1984 and its gallonage was included in Chevron's for that year. Gulf is stated separately in 1983 to keep the tables in balance. Also, in the 1984 and 1983 tables, the percentage changes on an industrywide basis are not comparable [illegible]

Share of Market—Top 20 Companies in 1985

Production

	Crude oil and liquid oil (Add 000 b/d)	% of Mkt.
Exxon	768.0	7.22%
Standard Oil	719.7	6.77
Arco	647.7	6.09
Texaco	640.0	6.02
Chevron	587.1	5.52
Shell	530.0	4.98
Amoco	401.0	3.77
Mobil	352.0	3.31
Phillips	346.0	3.25
Sun	195.1	1.83
Unocal	170.9	1.61
U.S. Steel	160.2	1.51
Occidental	147.6	1.39
DuPont	120.0	1.13
Tenneco	101.4	0.95
City of Long Beach	81.7	0.77
Amerada Hess	72.0	0.68
Union Pacific	67.9	0.64
El Paso	54.7	0.51
Sante Fe	49.9	0.47
U.S. Total	10,636.0	100%

	Natural gas Millions/CF	% of Mkt.
Chevron	765,770	4.66%
Exxon	761,025	4.63
Texaco	755,915	4.60
Amoco	682,185	4.15
Mobil	603,345	3.67
Shell	601,885	3.66
Arco	485,355	2.95
Tenneco	375,692	2.29
Phillips	319,740	1.95
Unocal	287,255	1.75
Sun	239,440	1.46
DuPont	230,680	1.40
Occidental	219,365	1.34
Tex. Oil & Gas	198,475	1.21
Consolidated Gas	150,100	0.91
Pennzoil	138,438	0.84
U.S. Steel	137,712	0.84
Union Pacific	115,194	0.70
Enron Corp.	109,309	0.67
El Paso	107,000	0.65
	16,428,000	100%

Proved Reserves

	Crude oil and liquid oil (Million/bbl.)	% of Mkt.
Arco	2,746.0	7.55%
Exxon	2,722.0	7.49
Standard Oil	2,647.8	7.28
Shell	2,528.0	6.95
Chevron	2,088.0	5.74
Amoco	1,782.0	4.90
Texaco	1,766.0	4.86
Mobil	1,036.0	2.85
Sun	699.0	1.92
Unocal	666.0	1.83
U.S. Steel	586.4	1.61
Phillips	576.0	1.58
Occidental	546.0	1.50
DuPont	373.0	1.03
Tenneco	318.0	0.87
Amerada Hess	213.0	0.59
Union Pacific	169.5	0.47
Pennzoil	156.0	0.43
Sante Fe	131.3	0.36
Tex. Oil & Gas	106.8	0.29
U.S. Total	36,360.0	100%

	(Billions/CF)	% of Mkt.
Exxon	17,962	9.29%
Amoco	9,902	5.12
Chevron	7,752	4.01
Mobil	7,600	3.93
Standard Oil	7,219	3.73
Shell	7,051	3.65
Arco	6,134	3.17
Texaco	5,803	3.00
Unocal	4,728	2.45
Phillips	3,580	1.85
Tenneco	3,564	1.84
Sun	2,588	1.34
El Paso	2,426	1.25
Occidental	2,264	1.17
DuPont	2,105	1.09
Texas Oil & Gas	1,836	0.95
U.S. Steel	1,797	0.93
Union Pacific	1,662	0.86
Panhandle East.	1,465	0.76
Enron Corp.	1,388	0.72
	193,369	100%

Refining Capacity

	Capacity (000 b/d)	% of Total capacity
Chevron	1,879.2	12.73%
Exxon	1,200.0	8.13
Shell	1,019.6	6.91
Amoco	982.0	6.65
Texaco	873.2	5.92
Mobil	755.0	5.11
Standard Oil	664.5	4.50
Arco	655.0	4.44
U.S. Steel	492.5	3.34
Unocal	474.5	3.21
Sun	443.0	3.00
DuPont	400.0	2.71
Ashland	346.5	2.35
Phillips	300.0	2.03
Southland	297.0	2.01
Koch	280.0	1.90
Coastal	261.3	1.77
Union Pacific	220.0	1.49
Kerr-McGee	164.8	1.12
Total Petro	152.0	1.03
U.S. Total	14,761.5	100%

(000 b/d)	Runs capacity	% of Total
Chevron	1,358.0	11.25%
Exxon	1,054.0	8.73
Shell	890.0	7.37
Amoco	839.0	6.95
Texaco	838.0	6.94
Arco	750.9	6.22
Mobil	647.0	5.36
Standard Oil	597.5	4.95
Phillips	487.0	4.03
U.S. Steel	402.7	3.34
Sun	391.7	3.24
Unocal	374.0	3.10
DuPont	365.0	3.02
Ashland	297.5	2.46
Southland	219.0	1.81
Union Pacific	186.2	1.54
Coastal	145.0	1.20
Total Petro	143.4	1.19
Diamond Sham	124.8	1.03
Kerr-McGee	122.0	1.01
	12,073.5	100%

Note: American Petroleum Institute, Market Shares and Industrial Company Data for U.S. Energy Markets 1950-1985.

ATTACHMENT 3; Exclusive Dealing

Chevron U.S.A. Inc.
P. O. Box 1706, Atlanta, GA 30301

February 12, 1986

Dear Chevron Jobber:

It has recently come to our attention that some Chevron jobbers have been soliciting the sale of, or have in fact sold, Chevron products to Chevron dealers who have direct Supply Contracts with Chevron. The purpose of this letter is simply to remind all Chevron branded jobbers that the occurrence of such activity may jeopardize the jobber's relationship with Chevron.

While Chevron dealers may purchase non-Chevron motor fuels from others (subject to the dealer fulfilling his obligations under his Supply Contract with Chevron continuously to offer for sale all grades of Chevron motor fuels), Chevron's Supply Contracts with both its two-party and three-party dealers require that the dealer purchase from Chevron all Chevron motor fuels necessary to serve demand for Chevron motor fuels at the dealer's station. Hence, any purchase of Chevron motor fuels by any direct supplied Chevron dealer from a Chevron jobber is a breach of the dealer's Supply Contract with Chevron.

Any sale by a jobber of Chevron motor fuels to any Chevron dealer who is now a party to a Supply Contract with Chevron constitutes a wrongful interference by the jobber with Chevron's contracts with those dealers, and may result in termination of the jobber agreement with Chevron. The Branded Jobber Petroleum Products Agreement permits termination by Chevron if "jobber knowingly induces the breach by a third party of a contract between Chevron and the third party."

If you have any questions whether any particular service station selling Chevron gasolines has a direct Supply Contract with Chevron, please contact me.

Very truly yours,

CHEVRON U.S.A. INC.

By:
S. P. WILLIAMS
Wholesale Manager

Dealers sue Texaco over rack-DTW spread

Texaco dealers claim they were told they could "turn in the keys" to their stations if they continued trying to cash in on an 18cts differential between Texaco rack and DTW prices by buying from Texaco jobbers.

In an antitrust suit just filed in Texas, the dealers say they were buying product from Texaco jobbers for 11cts under Texaco DTW prices when Texaco found out and told the jobbers to stop supplying them.

Texaco denies the claims. It lets dealers buy from Texaco jobbers as long as the product's sold under the Texaco flag, says an official.

Texas Attorney-General Jim Mattox says he'll investigate dealer claims that majors are "manipulating" prices by cutting jobber racks so they can dump excess product in rural markets, while keeping DTW numbers "artificially high" to protect profitable metro markets.

"Dealers are playing a game -- they're just trying to push their market along a bit faster. You don't hear any gripes in a rising market when jobber margins almost disappear," says one refiner.

Meantime, Connecticut plans a similar probe after consumer group complaints over high pump prices.

as rack-DTW price gap widens

Dealers shop for spot market gasoline

Pressure on major oil companies to cut DTW prices is increasing as dealers buy from branded jobbers and shop the spot market for cheaper supply.

"We've bought spot market product for our members for the last three weeks," says Texas dealer exec, Bill Ligon. "We can get it for 15-16cts under DTW prices from branded jobbers. We've bought 500,000 gallons so far."

Because of the spot shopping sprees by dealers from the Gulf to East Coast, majors are cracking down. They're threatening to terminate dealers running even if they run correctly branded 'gas' through their pumps if the product wasn't direct-delivered 'gas,' some dealers claim.

"As long as dealers do it the right way, there's nothing majors can do about it," says Ligon. He tells his 1,000 plus dealer members to debrand pumps if they sell unbranded product, and to remember to buy at least 50% of their 'gas' from their major supplier.

Though Chevron-Gulf cut DTW 10cts last week and majors like Amoco, Chevron and Mobil fell 5-10cts, the cuts aren't deep enough, say dealers staring at near-30ct jobber-DTW spreads in some markets.

A random survey by Oil Price Information Service has average jobber-DTW spreads looking like this last week:

Amoco	13.76cts gal	Sohio-Gulf	25.48cts
Chevron	17.23cts gal	Marathon	15.56cts
Exxon	17.73cts gal	Mobil	22.97cts
Getty	24.76cts gal	Sunoco	24.35cts

Amoco seems to be at the low end of the scale because its jobber prices in some markets are several cents over other racks. But its home-town prices in Chicago where it's more competitive show a near-20cts differential between jobber and DTW no-lead prices.

* For a glimpse of jobber-DTW spreads by brand, see charts at the side of this page.

Following figures, from O Price Information Service show the jobber rack-DTW spreads as of midweek las week at randomly-selected terminals. Prices shown a for unleaded gasoline and do not include dealer rebates or incentives, which would cut spreads perhaps by a cent or so.

Amoco	Rack	DTW
Atlanta	58.31	70.00
Baltimore	73.75	81.10
Miami	71.57	79.50
Chicago	52.27	72.80
Detroit	49.79	71.10

Chevron	Rack	DTW
Atlanta	49.10	66.20
Boston	54.35	70.90
Miami	54.05	76.10
Denver	49.99	58.80
L.A.	60.00	70.50
Newark	48.70	73.40

Sohio/Gulf	Rack	DTW
Atlanta	52.37	71.
Miami	57.32	79.
Baltimore	58.70	85.
Boston	51.82	85.
Columbus, Oh.	48.21	74.

Mobil	Rack	DTW
Atlanta	51.57	69.60
Boston	55.63	76.90
Newark	50.88	81.00
Phila	51.08	75.00
Chicago	48.21	71.00
Detroit	48.75	71.90

Sun	Rack	DTW
Baltimore	59.00	82.70
Boston	58.11	82.00
Newark	54.10	83.30
Phila	55.29	78.10
Chicago	48.41	71.00
Detroit	49.15	73.05

Marathon	Rack	DTW
Chicago	46.75	63.
Columbus, Oh.	48.20	61.
Detroit	48.00	65.
Indianapolis	46.00	60.

Getty	Rack	DTW
Boston	52.96	79.00
New Haven	56.23	80.82
Newark	49.69	81.13
Phila	50.63	75.60

Senator KENNEDY. Mr. Foer, welcome. I apologize for not being here sooner. I'm not sure whether our Chairman introduced you or not, but we're delighted to have you here. If he hasn't, I'm delighted to give you one, but otherwise, if he has, why don't you proceed?

TESTIMONY OF ALBERT FOER

Mr. FOER. Thank you. My name is Albert Foer. I'm Chairman of the Board of Melart Jewelers, which is a 19-store, specialty retail chain operating in the Washington, D.C.-Baltimore area.

I think I was invited because, as a small businessman, I also have a background in antitrust, as a former senior executive of the Federal Trade Commission, where I served under five different chairmen between 1975 and 1981.

I'm not going to read my testimony that was prepared, in the interest of time.

The CHAIRMAN. The entire statement will be placed in the record. It's important that it be done.

Mr. FOER. Thank you. What I'll do is just focus as directly as I can on four or five issues that have not received a great deal of attention yet, that are antitrust issues, and that have a tremendous significance for consumers and for small businessmen.

Let's start with the retail price maintenance. I'll go over that quickly, because it has been spoken of earlier today. RPM is the practice whereby a manufacturer or a supplier binds the retailer to sell only at a suggested retail price.

In today's economy, the retailer is free to come to the marketplace with his own strategy, which may be a price-oriented strategy; it may be a quality and reputation—credibility strategy; it may be, and usually is, some mix in between. The consumer is well served by this freedom and flexibility, because the retailer has to go out into the marketplace and design a strategy that satisfies the consumer.

What Professor Bork stands for is an end to this freedom. He would permit retail price maintenance, on the theory that if the manufacturer wants it, it must be efficient, and therefore, in his mind, it is good. As a retailer, as a consumer, I very strongly disagree.

Let me move to Robinson-Patman. I'm not going to try to explain that law, which is very difficult to understand in the first place, and is not free from some very valid criticism. But I want to say this: Businesses have coped with it. Bork says the law is wrong, and he would ignore it. But without Robinson-Patman, things would change, I think dramatically, in the marketplace.

In the absence of Robinson-Patman, I, as a retailer with some market power—not very much, but some for certain vendors—could negotiate lower prices, or other beneficial terms that give me an advantage compared to my smaller competitors. And that sounds good, until I turn around and realize I've also got much bigger competitors who could get much better bargains from their vendors—my vendors—not because they're more efficient, but simply because they have more leverage—more market power.

Now, what's at stake here is a shift. Eliminating Robinson-Patman would result in concentration. Small businesses would lose out, larger businesses would benefit. It's that type of a shift that comes through time after time as we talk about Professor Bork's—Judge Bork's—attitudes toward the antitrust laws.

Take the concept of predation. Bork doesn't believe in predation. Sitting there in the academy he decided that predation probably never happens, unless the government participates in it. So he would oppose government-assisted predation, and I agree with that; but otherwise Bork would eliminate the idea of predation from the antitrust laws.

Small business people know that predation occurs. Big firms have advantages over small firms. The rules of the game, which Bork has been trying to change—are to give us some kind of basic, rough equality of opportunity, so we can get out there and compete on the merits. That's all we want.

But if a large company, with large resources, utilizes those resources unfairly, there should be some way that the smaller player can counter. And what Bork's saying is, predation does not occur, let's ignore it. The practical effect is, predation will occur all that more frequently.

Finally, let me touch on a procedural matter. Antitrust is a very complex area of the law. To bring an antitrust case, whether you're a private plaintiff or whether you're the government, is an expensive, time-consuming process.

Small business usually has to depend on its own abilities to bring the case, or on the government. The value of antitrust, therefore, depends very much on having some clear rules to expedite the case, and we call those rules "per se" rules. They may occasionally be arbitrary, but they bring efficiency to the system so that it can work.

Judge Bork, in a number of areas, including vertical restraints and boycotts, would eliminate per se rules. What I want to point out to you is that these procedural changes would have very dramatic, substantive impact of a predictable nature. Without per se rules, the defendant has a major advantage and the defendent is most often the larger company.

Now just to conclude briefly, we read a lot in Mr. Bork's writings about free markets and consumer welfare. What we're really talking about are a set of policies that undercut the ability of small business to compete, and reduce the options available to consumers.

The overall impact is far from the congressional intent. It represents dramatic changes in the rules of the game. And, in my view, Professor Bork's position on antitrust is not antitrust, but trust. Trust that the largest corporations will benefit society by growing ever larger through mergers and through methods of competition that, hitherto, have been considered unfair and illegal.

[The statement of Mr. Foer follows:]

TESTIMONY

OF

ALBERT A. FOER

BEFORE THE U.S. SENATE JUDICIARY COMMITTEE

REGARDING THE NOMINATION OF JUDGE ROBERT H. BORK

"ANTITRUST: THE BORKEAN PARADOX"

SEPTEMBER 30, 1987

ANTITRUST: THE BORKEAN PARADOX

Mr. Chairman, Senators:

My name is Albert A. Foer. I have been invited to share my personal views as a small business executive who is familiar with antitrust, concerning Judge Bork's likely impact on small business if he is confirmed. I am chairman of Melart Jewelers, a 19-store retail jewelry company operating in the national capital region. From 1975 to 1981, I was a senior antitrust policy planner at the Federal Trade Commission. (Additional biographical notes are appended.)

Judge Bork's special area of expertise is antitrust, and his writings, particularly the 1978 classic, The Antitrust Paradox, set out his views in enormous detail. It is likely that if he were confirmed, his views on antitrust would play an especially weighty role by virtue of his authority as an expert and his personal persuasiveness. If I were head of a Fortune 500 firm, I would look to this future with glee, because his conclusions most often coincide with the short term economic interests of our largest companies. There are paradoxes here, and I will, if I may paraphrase the Judge, title these brief remarks: "Antitrust: The Borkean Paradox."

PARADOX 1. Judicial Restraint Is Judicial Activism.

It is a paradox that Robert Bork claims to be a believer in judicial restraint when in his field of legal expertise he has so patently re-written the legislative history. In Bork's view, the one and only goal of antitrust is what he calls "consumer welfare," or more generally "efficiency." This is not the time to recite the full legislative history of the various antitrust laws, but the fact is that Congress enacted the antitrust laws with multiple goals in mind, including maintaining the autonomy of small economic units; freedom of opportunity to compete on the merits; decentralization of power; protection of consumer sovereignty; distributional equity; and fairness in the marketplace. 1]

To eliminate all of these goals is, bluntly, to re-write history, and to veto the Congressional intent. To postulate a single over-riding goal - efficiency - and to draw out an elaborate logical system of law and economics from that initial false assumption is ideologically inspired scholarship at best; if the same process were applied by a Supreme Court Justice, we would witness the paradox of "judicial restraint" legislating.

1] See Foer, "The Political-Economic Nature of Antitrust," 27 St. Louis U.L. REV. 331 (1983). Also see Lande, "An Antitrust Activist?" Nat. L.J. (Sept 7, 1987).

PARADOX 2. "Consumer Welfare" Is Big Business Welfare.

Bork makes "consumer welfare" his touchstone. What needs to be understood is that this language doesn't mean what it says. To quote Bork, "Those who continue to buy after a monopoly is formed pay more for the same output, and that shifts income from them to the monopoly and its owners, who are also consumers. This is not dead-weight loss due to restriction of output but merely a shift in income between two clauses of consumers. The consumer welfare model, which views consumers as a collectivity, does not take this income effect into account."2] I come from the school of political science that sees politics as determining (in the words of Harold Lasswell) "who gets what when". Judge Bork's reinterpretation of antitrust should properly be viewed as a theory that may result in greater efficiency for the society as a whole, but surely results in a shift of income and power away from the smaller and toward the larger economic units.

PARADOX 3. The Retailer's "Right" to Maintain Prices Is the Retailer's Strategic Restraint.

Bork believes that the long-held antitrust doctrine outlawing retail price maintenance should be overruled. In other words, I as a retailer, should have the "right" to do business with manufacturers who can tell me to charge only a certain price, or sell only on certain terms, and can cut off my supplies if I refuse. Only if retailers get together and enforce retail price maintenance on the manufacturer would Bork see an antitrust problem.

2] Bork, The Antitrust Paradox 110 (1978).

Let me say that "getting together" can occur in ways that leave no tracks, and that in markets where a retailer is very strong, it would be to his advantage to have RPM, because no one could cut price on him and he could extend his dominance. However, in markets where the retailer is not strong, he especially needs the ability to control his own prices and terms, to compete successfully. Each retailer brings his goods to the market in a different way with a different emphasis. For some it is all price, for others it is all service, and for most it is a mix of service and price. To assure vigorous competition, retailers need to be free to select their own strategy and not be bound by the manufacturer's strategy. This is not merely a matter of small business' freedom, but of the ultimate consumer's ability to set his or her own priorities.

Bork sees that there may be a reasonable justification for a manufacturer to restrain retail prices, e.g. to avoid free-rider problems of discounters who do not provide service, and he concludes that RPM is therefore justified. But the conclusion is over-broad, since service can be required by contract and the manufacturer is unilaterally free not to deal (the Colgate doctrine) with anyone whose business practices he dislikes. The consequences of Bork's overstatement, which were clear to Congress when it repealed the "fair trade laws", would restrain both retailers and consumers in ways that are unnecessary and improper.

Without going into detail, Bork takes similar positions on other vertical restraints such as tie-in sales and market divisions, where the result would be the manufacturer's or supplier's dominance over the retailer. This shift in power has been of concern to Congress in the past, as it should be, if politics is about "who gets what when".

PARADOX 4. The Free Market Is Free Only to the Established.

Bork poses as the advocate of an open and free market, but his policies would make it more difficult for new entrants to come on the scene and grow as competitive forces. One example of this has just been described, in that vertical restraints may make it more difficult for newcomers to obtain supplier relationships and to gain market share through discount strategies. Another example is predation.

Predatory strategies, such as cutting prices below cost in order to deter new entrants from a market, probably never happen, says Bork, because the predator will have to spend more than he is likely to recoup. Is Bork right? Small and medium size businesses know that large companies have more resources to throw into a fight and that they sometimes use these resources to discipline the competition or to "teach" potential competitors. To abandon the field by making it a point of principle that predation (other than predation by use of governmental processes) can't happen and therefore should not be of concern to antitrust enforcers makes it likely that predation actually will occur more often.

PARADOX 5. "Winking" At Robinson-Patman Is To Wink At The Destruction Of Competition.

Robert Bork has been quoted as saying, "In the Robinson-Patman Act, when Congress said it wanted to forbid price discrimination to protect competition, they said it with a wink. I don't think it's a judge's job to enforce winks."[3] I don't know whether he actually said that, but Judge Bork's attitude toward Robinson-Patman is clear: "The law ought not to attempt to deal with the subject."[4]

I will not try to defend all aspects of Robinson-Patman; one of its problems as a law is that it is extremely difficult to understand. As a middle-sized retailer, my sense is that Robinson-Patman sometimes keeps me from getting the lowest price or other special terms that I might obtain by full use of my market power; but it also keeps my much larger competitors from gaining a great edge over me. If Robinson-Patman were relegated to the junkyard of history, I would be in a position to gain market share over my smaller competitors, and some of them would disappear. At the same time, my larger competitors would use their market power to buy cheaper than me and would be able to undercut me and eventually remove me from the market. Robinson-Patman may not always make sense, but in practice it helps maintain a rough equality of opportunity, so that retailers can compete with each other on the merits. The consumer benefits because in

[3] Cited by N.Y. Times, 3/8/85, quoting Bork at Antitrust Conference.

[4] Bork, The Antitrust Paradox 401 (1978).

the long run there are more competing retailers to choose among. A Supreme Court Justice who is dedicated to the overthrow of Robinson-Patman will have a dramatic negative impact on our current arrangements of doing business.

PARADOX 6. "Mere" Procedures Determine Who Wins.

Antitrust cases often turn on whether the plaintiff must make his case under *per se* rules or under the "rule of reason." Judge Bork challenges traditional approaches by arguing, for example, that vertical restraints should be *per se* legal instead of illegal and that boycotts or agreements among competitors to refuse to deal should no longer be *per se* illegal. In *The Antitrust Paradox*, Bork argues, "No Court is constitutionally responsible for the legislature's intelligence, only for its own. So it is with specific antitrust laws. Courts that know better ought not accept delegations to make rules unrelated to reality and which, therefore, they know to be utterly arbitrary."5] Without stopping to argue the merits of Bork's proposed changes to the procedural rules, I just want to point out that as a generality if you apply rule of reason the defendant wins, and in antitrust the defendant is usually the larger economic entity. Rule of reason means a case will be long and expensive, and there will almost always be some colorably reasonable explanations for what the defendant has done. The shift in procedural rule becomes a shift in substantive outcome. Judge Bork's eagerness to make these shifts is another reason why those who believe in the

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5] Bork, The Antitrust Paradox 410 (1978).

importance of small businesses and medium size businesses should be afraid of Justice Bork.

PARADOX 7. There Can Be Adequate Competition Without Competitors.

Competition, to the unsophisticated eye, increases, at least up to a point, when there are more competitors, and decreases when there are fewer. Robert Bork, however, sees very little need for competitors as a precondition of competition. Of course what he is really after is the most efficiency, not the most competitive market. He says, in The Antitrust Paradox, "...[W]e are in an area of uncertainty when we ask whether mergers that would concentrate a market to only two firms of roughly equal size should be prohibited. My guess is that they should not and, therefore, that mergers up to 60 or 70 percent of the market should be permitted..."6] Although Bork backs down from this somewhat in later discussion, it is clear that he would allow horizontal mergers which would result in substantial market concentration. He is virtually unconcerned about vertical mergers and would never interfere with a conglomerate merger. Basically, Bork's posture is not one of antitrust, but of trust — in the ability of larger corporations to benefit the society by growing ever larger through acquisition and merger.

Why should this be of concern? Here's one of the many possible answers: As the number and variety of independent decision centers decreases, the amount of opportunity for those not already within the

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6] Bork, The Antitrust Paradox 221 (1978).

established centers of power declines. As a retailer, I would prefer to buy my supplies from a fragmented industry rather than a highly concentrated industry, because there are more opportunities to make deals, and I can ultimately offer a better deal to my customers. While Bork teaches that fewer competitors may be more efficient, reality teaches that unless we have a policy which offers some degree of protection to competitors who are reasonably efficient but relatively small, there will be precious little competition in the marketplace. Competition without competitors is the final paradox in the Borkean world of antitrust.

Conclusion

In this brief review of Judge Bork's approach to antitrust, I've tried to point out ways in which he paradoxically speaks of free markets and the welfare of consumers but in fact would undercut the ability of small companies to flourish, and would reduce consumer options. I do not mean to suggest that everything Judge Bork has written on antitrust is flawed or foolish, because it certainly is not, but the overall impact of his approach is far from the original and repeated expressions of Congressional intent, and the impact on our institutions of commerce could be both dramatic and adverse to the interests of smaller businesses and consumers.

ALBERT A. FOER

Albert A. Foer is Chairman of the Board of Melart Jewelers, Inc., a 19-store specialty retailer doing business in Maryland, Virginia, and the District of Columbia. He is on the Board of Directors of the Jewelers of America, the Jewelry Industry Council, and the Diamond Council of America, and on the Steering Committee of the Greater Washington Board of Trade's Retail Bureau; he testifies today in his personal status as a small business person who is particularly familiar with the antitrust laws.

Mr. Foer holds degrees from Brandeis University (A.B. 1966), Washington University (M.A., political science, 1967), and the University of Chicago (J.D., 1973), where he was Associate Editor of the University of Chicago Law Review.

Mr. Foer practiced law at two Washington law firms and was a Senior Executive at the Federal Trade Commission, serving under five different Chairmen (of both political parties) from 1975 to 1981. His highest rank was Acting Deputy Director of the Bureau of Competition. He also served as a Commissioner on the National Commission on Electronic Fund Transfers, and represented the FTC on the President's Antitrust Study Commission in 1978. Mr. Foer joined Melart Jewelers nearly five years ago.

Senator **Kennedy**. We want to thank you very much for your presentation. It's an important presentation because I think what we've heard from the panel is some real-life experience, in terms of how antitrust law is going to reflect on the consumers of this country.

I know this has been an issue of considerable concern.

I want to thank you very much for joining with us today, and I'll recognize——

Senator **Metzenbaum**. Mr. Chairman, I am very interested in what these witnesses said, but I also recognize there are five other witnesses, two of whom are former Attorneys General, and I would be willing, if everybody else would be agreeable, to waive any questions in connection with this panel, and see if we couldn't move the hearing along.

Senator **Simpson**. Mr. Chairman, on behalf of our side, I think I speak for our leader, Senator Thurmond, that would be perfectly appropriate if we would have the opportunity to submit some questions in writing.

The **Chairman**. Yes, with that objection there would be no problem.

Gentlemen, it's a long way to come, it's an important matter, we appreciate it, and please—and I mean this sincerely—do not read the lack of time as a lack of interest. I suspect you will find yourselves quoted on the Senate floor before this is over, and frequently, I suspect. But I truly appreciate your time and your effort. Thank you very, very much.

Senator **Metzenbaum**. Thank you very much.

The **Chairman**. Now, we have one very distinguished—former Attorney General to testify next—Herbert Brownell, who was Attorney General for General Eisenhower. Would you please come forward, General?

He is counsel to the New York City firm of Lord, Day and Lord, and has practiced law for more years than I have been around, and a man of immense integrity and standing.

General Saxbe had hoped to be here with you, General Brownell, but he could not be here, I'm told. His statement will be placed in the record, but we welcome you and are delighted. I understand you had to—correct me if I'm wrong—but you had to come back from Europe for this, and it's a great testament to the nominee, and the committee's flattered to have you here.

Would you mind standing to be sworn?

Do you swear that the testimony that you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Brownell**. I do.

The **Chairman**. Thank you.

Senator **Kennedy**. Mr. Chairman, could I just add a word of welcome to General Brownell. We recognize that his career continues in public service. He serves on the Bicentennial Commission on the Constitution, which I and several other members of our committee—Senator Thurmond, Senator DeConcini—also serve on, and it is a pleasure to work on that Commission with General Brownell, and I, too, want to join in welcoming you here.

TESTIMONY OF HERBERT BROWNELL

Mr. BROWNELL. Thank you.

The CHAIRMAN. Thank you, General, and please proceed.

Mr. BROWNELL. I have a very brief statement, Mr. Chairman and members of the committee, which I could read, if that's agreeable.

The CHAIRMAN. Please.

Mr. BROWNELL. Because I do appreciate the opportunity to testify before this committee in favor of the confirmation of the appointment of Judge Bork to be an Associate Justice of the Supreme Court.

Judge Bork, in my opinion, is highly qualified to hold the position for which he has been nominated by President Reagan. He possesses in full measure the high standards of personal integrity, character, of judicial temperament, broad professional, legal and judicial competence.

These essential qualifications appear to me to be conceded by all, both proponents and opponents of confirmation. The sole objection to Judge Bork's confirmation so far as I am aware is to his ideology.

While I was Attorney General under President Eisenhower, as you mentioned, four persons were nominated to the Supreme Court by the President on my recommendation among others. They were confirmed after a favorable vote by this committee. They were Earl Warren, John Marshall Harlan, William Brennan and Charles Whittaker.

I think the members of this committee will readily recognize that these persons represented great diversity of ideology. President Eisenhower believed and acted upon the belief that the Court's membership should represent diverse ideological points of view.

In order to maintain public confidence in the Court which is an unelected body, it seems to me it is of great importance to have diverse points of view represented. If the Senate should confirm only nominees with an ideology that conforms to the Senate's prevailing ideology, it would be a signal that the Senate wanted the Court to decide constitutional issues not on an independent judicial basis but on a political ideological basis.

Such action by the Senate, if carried to a logical conclusion, would, in my opinion, violate the separation of powers doctrine embedded in the Constitution. Your predecessors on this committee led the nation in rejecting the court packing plan of yesteryear which was aimed at requiring ideological conformity on the Court. Well, I believe that the committee should not now do indirectly what it then refused to do directly.

So since Judge Bork meets the basic qualifications of Court membership, that is, character, judicial temperament and legal and professional skills and experience, I urge this committee to act favorably on his nomination.

[Telegram and prepared statement follows:]

TEXT OF A TELEGRAM FROM THE HONORABLE HERBERT BROWNELL, FORMER ATTORNEY GENERAL OF THE UNITED STATES, TO SENATOR JOSEPH BIDEN

September 20, 1987

Senator Joseph Biden
Chairman
Senate Judiciary Committee
Washington, D.C.

I have requested the opportunity to testify for Judge Bork and am scheduled to appear before your Committee on Monday, September 21st, along with other former Attorneys General. Unfortunately, I must be in Geneva, Switzerland, on that date on private legal business, and am arranging to have my written statement submitted to you and the Committee. I will appreciate it if you would have the statement read and filed with the record of the Committee's confirmation hearings.

Herbert Brownell

STATEMENT BY
THE HONORABLE HERBERT BROWNELL
FORMER ATTORNEY GENERAL OF THE UNITED STATES
IN SUPPORT OF THE NOMINATION OF
JUDGE ROBERT BORK
TO BE AN ASSOCIATE JUSTICE
OF THE SUPREME COURT OF THE UNITED STATES

I appreciate the opportunity to testify before the Senate Judiciary Committee in favor of the confirmation of the appointment of Judge Bork as Associate Justice of the United States Supreme Court.

Judge Bork, in my opinion, is highly qualified to hold the position for which he has been nominated by President Reagan. He possesses in full measure the high standards of personal integrity and character, of judicial temperament, and of broad professional, legal and judicial competence. These essential qualifications appear to be conceded by all--both proponents and opponents of confirmation.

The sole objection to Judge Bork's confirmation, so far as I am aware, is to his ideology.

While I was Attorney General under President Eisenhower, four persons were nominated to the Supreme Court by the President on my recommendation, among others. They were confirmed after favorable vote by this Committee. They were: Earl Warren, John Marshall Harlan, William Brennan, and Charles Whittaker.

Members of this Committee will readily recognize that these persons represented great diversity of ideology. President Eisenhower believed, and acted upon the belief, that the Court's membership should represent diverse ideological points of view. In order to maintain public confidence in the Court--an unelected body--it is of great importance to have diverse points of view represented. If the Senate should confirm only nominees with an ideology that conforms to the Senate's prevailing ideology, it would be a signal that the Senate wanted the Court to decide Constitutional issues, not on an independent, judicial basis, but on a political, ideological basis.

Such action by the Senate, carried to a logical conclusion, would in my opinion violate the separation of powers doctrine imbedded in the Constitution. Your predecessors on this Committee led the Nation in rejecting the "Court packing" plan of yesteryear which was aimed at requiring ideological conformity on the Court. The Committee should not now do indirectly what it then refused to do directly.

Since Judge Bork meets the basic qualifications of Court membership--character, judicial temperament, and legal and judicial skills and experience--I urge this Committee to act favorably on his nomination.

Herbert Brownell

The **Chairman**. Thank you very much, General. It really is an honor to have you here.

Mr. **Brownell**. Thank you, sir.

The **Chairman**. It's my first opportunity to meet you, and at that it's across a table. I have enormous respect for you, and I am really flattered you'd take the time to come.

I'm going to refrain from questions, but before I yield, does my colleague from Ohio have a question?

Senator **Metzenbaum**. I have a tremendous amount of respect for the distinguished public career of Mr. Brownell, and I don't see that I'm going to gain any browny points by asking questions of him, and my opinion is that this hearing is winding down. I think the whole committee ought to waive their questions and indicate their gratitude for your appearance.

Mr. **Brownell**. That's very kind.

The **Chairman**. Senator Thurmond.

Senator **Thurmond**. Mr. Brownell, glad to see you again.

Mr. **Brownell**. Thank you, Senator.

Senator **Thurmond**. The only question I have is this. You know Judge Bork personally, don't you?

Mr. **Brownell**. Yes, I do.

Senator **Thurmond**. How long have you known him?

Mr. **Brownell**. I have known him for about 7 or 8 years. I met with him in private practice.

Senator **Thurmond**. From your knowledge of him, does he have the character and integrity and the honor to be a good Supreme Court Justice?

Mr. **Brownell**. Yes, without question in my opinion.

Senator **Thurmond**. Does he have the judicial temperament to be a good Supreme Court Justice?

Mr. **Brownell**. Yes, I think you've evidenced that in this committee in your questioning of him.

Senator **Thurmond**. Does he have the professional competence and qualifications from a scholastic standpoint to be a good Supreme Court Justice?

Mr. **Brownell**. Very superior qualifications in that regard.

Senator **Thurmond**. Do you know of any reason why he should not be confirmed?

Mr. **Brownell**. I do not.

Senator **Thurmond**. Some evidence has come out here that he was against blacks and against women and so forth and so on. We've offered evidence to the contrary, but they keep on saying that, and he himself said that he would be fair to blacks and fair to women and so forth. He's answered those himself.

It seems to me that there are two things that should count most. One is his own testimony, and anyone who heard his own testimony seems to me to be convinced, and the other is his record on the circuit court.

That's the juice in the coconut, the decisions he's handled. He's written 150 decisions on that court. He's participated in 400 decisions, and none of those decisions have been overruled by the Supreme Court.

Chief Justice Burger said that if that man is an extremist, he's an extremist. He says he's in the mainstream as far as he can tell. Lloyd Culter made a similar statement about Judge Bork.

If you were a member of the Senate, would you vote to confirm him or not?

Mr. **Brownell**. Yes, I would.

Senator **Thurmond**. Thank you very much.

The **Chairman**. The Senator from Wyoming.

Senator **Simpson**. Mr. Brownell, it's nice to see you, sir.

Mr. **Brownell**. Thank you.

Senator **Simpson**. And I bring the special greetings of my father, Milward Simpson. I know of your friendship with him and he is 90 years old, and he said I see that Herb Brownell is going to testify. He said give him my fond regards and deepest respect, and from my mother, too.

Mr. **Brownell**. That's very nice to hear.

Senator **Simpson**. He shared some lovely times with you.

Mr. **Brownell**. Give him my best.

Senator **Simpson**. I shall.

I have no questions, Mr. Chairman. But a man of this stature and of these credentials in the United States should be listened to by all of us, an extraordinary record of public service, Herb Brownell. I just hope that we're listening and there isn't anything here that has anything to do with turning back the clock and chilling effect and all these things and some of the really ragged things we've heard about this man, and I'm sure you've been watching or listening to these proceedings and just this single question:

What is your feeling about this assault upon this remarkable man?

Mr. **Brownell**. I have not listened so much to others opinions in this regard because I've been out of the country part of the time that the hearings were going on, but I am personally satisfied that he is a man of high character, possess the requisite judicial temperament and among the people who have come before this committee for confirmation to the Supreme Court over the years none has had a better and more extensive experience as a lawyer and law teacher and as a federal judge.

Senator **Simpson**. And you've seen a few of them in your time, haven't you?

Mr. **Brownell**. Yes, I'm an old customer at this committee. I've been up here so many times discussing the confirmation of federal judges, including, as I said, in my prepared statement four nominees for the Supreme Court.

Senator **Simpson**. I thank you, sir. It's nice to see you.

The **Chairman**. Thank you.

The Senator from Iowa.

Senator **Grassley**. Mr. Chairman, I don't have any questions either, but I think we ought to take note of the fact besides this outstanding former Attorney General we've had five or six other former Attorney Generals, and I think all but one have spoken very favorably of Judge Bork. Also remember most of them have had, as Attorney General Brownell has, involvement with selection of people for the Supreme Court.

It seems to me like this committee ought to give considerable weight to the judgment of these people who have been the highest legal officer of the executive branch of government. All have spoken favorably, except one, for Judge Bork.

The **CHAIRMAN**. Thank you very much. General, thanks for taking so much time. I appreciate it very much.

Our next and last but not least panel is made up of three witnesses who are representatives of the law enforcement community. First is Howard L. Johnson, President of the National Organization of Black Law Enforcement Executives and is a public safety director of Highland Park, Michigan. This organization consists of 1,675 members who hold management or command level positions to law enforcement agencies across the country and recently gave testimony in support of William Sessions to be the new FBI director.

Second will be Ronald Hampton, a 15-year veteran of the Washington, D.C., Police. He represents the National Black Police Officers Association. His organization represents the 30,000 black policemen and women and is nationwide and has been in existence since 1946.

Third is Mr. Robert Kliesmet. He was a Milwaukee police officer for nearly 30 years. A leader of the Milwaukee Police Association for 15 years and is now president of the International Union of Police Associations, AFL–CIO. The International Union of Police Associations represents over 20,000 police officers from departments throughout the country.

While we are waiting for the other two members of your panel to come, Mr. Kliesmet, I am going to read into the record a letter addressed to me dated September 30, 1987, from our former colleague John H. Buchanan, who now serves as chairman of the board of directors of People for the American Way.

"Dear Mr. Chairman."

"I've read with interest the allegations against People for the American Way entered into the record of the Bork hearings yesterday entitled 67 Flaws of the Bork Ad. Senator Hatch's accusations contain at least 68 flaws. He is wrong in his 67 interpretations and charges pertaining to our ad. He's even more wrong and inaccurate in repeatedly using the word 'falsehood' in describing portrayals of Judge Bork which is based on substantial documentary evidence," et cetera.

I will not read the remainder into the record. Just the concluding paragraph.

"Mr. Chairman, as a Republican, I do not consider this a partisan matter but one in which the constitutional rights and liberties of American citizens are and must be the first consideration of all who share in this historic decision."

Sincerely John H. Buchanan, Chairman of the Board.

Second, I'd like to enter into the record and ask unanimous consent that a letter which I will not read from the University of Chicago professor as to why Judge Bork is not like Hugo Black in his opinion. Professor Schulhoffer. The letter is addressed to the Chairman, dated September 28, and I ask unanimous consent that both these be placed in the record.

[Letter follows:]

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
1111 EAST 60TH STREET
CHICAGO • ILLINOIS 60637

September 28, 1987

Senator Joseph Biden
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Attention: Diana Huffman

Dear Senator Biden,

As a former law clerk (1967-68 and 1968-69) to Justice Hugo L. Black, I write to express my deep concern over the attempt by some witnesses before your committee to associate Justice Black's judicial philosophy with that of Judge Robert Bork.

Justice Black joined many of the decisions that Judge Bork has made a point to criticize. E.g., Shelley v. Kramer, 334 U.S. 1 (1948); Skinner v. Oklahoma, 316 U.S. 535 (1942). But more significant are the broader theories of interpretation that have earned Justice Black an enduring place in constitutional history.

Justice Black's most important contributions to constitutional law are located in the area of free speech. Of all the Justices to sit on the Court, Justice Black remains the preeminent advocate of a generous and unqualified interpretation of the first amendment's guarantee of freedom of speech. Judge Bork has espoused a shifting but consistently narrow view of first amendment protection. Thus, in the area at the heart of Justice Black's constitutional legacy, his views and those of Judge Bork are diametrically opposed.

In testimony before your committee on September 22, an important question was raised about Justice Black's conception of the "liberty" protected by the due process clause. I understand that Professor Laurence Tribe testified that no Justice in the Court's history had consistently adhered to a view of "liberty" as narrow as that held by Judge Bork. But Professor Michael McConnell appeared to imply that the views of Justice Black and Judge Bork on this issue were similar. McConnell's comment could leave your Committee with a serious misimpression about Justice Black's position. Please permit me to set the record straight.

In several of his opinions Justice Black did express the view that "liberty" within the meaning of the due process clause is restricted to rights expressly enumerated in the Bill of

Rights or elsewhere in the Constitution. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 507 (1965)(dissenting); Adamson v. California, 332 U.S. 46, 68 (dissenting). But these opinions do not tell the whole story. First, Justice Black often joined opinions that recognized fundamental liberties not explicitly enumerated. Second, even the restrictive theory that Justice Black sometimes espoused is far different from Judge Bork's position, because of the broader context of constitutional doctrine to which Justice Black passionately subscribed.

First, Justice Black often recognized basic rights not expressly mentioned in the constitutional text. For example, in Edwards v. California, 314 U.S. 160, 177 (1941), he joined Justice Douglas in a concurring opinion arguing that a state statute violated a citizen's inherent right to move freely from state to state. The opinion explicitly advocated a thesis of non-enumerated rights. Justice Black joined or wrote other opinions that extend constitutional protection to such non-enumerated liberties as the right to foreign travel, the right to practice a profession, the right to a private realm of family life (including the custody, care and nurture of children), and the right of marriage and procreation. These opinions, too numerous to describe in the body of this letter, are discussed in the Appendix I have attached.

The second point is even more important. The restrictive approach to non-enumerated liberties that Justice Black sometimes urged was possible for him only because he gave a very generous reading to the rights that are enumerated. Where others would find protection for personal liberties in a general right to privacy or in the inherent "civil rights of man," Justice Black often could find comparable protection in his understanding of the Bill of Rights, and particularly the first amendment's free speech guarantee. Thus, the right to join with others for peaceful purposes, the right to maintain the privacy of organization membership lists and even the right to organize a program of prepaid group legal services were held by Justice Black to be aspects of the freedom of association that he found implicit in the free speech guarantee.[1] Similarly, Justice Black was willing to recognize a constitutional right not to be exposed as an unwilling listener to a radio news program, but he based his analysis not on a right to "privacy" but (departing from the literal text) on the listener's right to free speech.[2]

Justice Black's judicial philosophy can be understood only against the background of his life-long battle against powerful, organized interests. Even at the time of his nomination to the Court, Justice Black's commitment to protecting the economically disadvantaged was clear; it had been the hallmark of his Senate career. His recognition of the Court's essential role in safeguarding minorities and the underprivileged was at all times a driving force behind his theories of interpretation and his sensibility as a judge. When it became clear that the Court would never accept his theory of "total incorporation," for example, Justice Black was explicit in stressing that literal adherence to text or history were to him less important than pragmatic realism in pursuit of the Constitution's larger plan for the protection of fundamental rights. Concurring in Duncan v. Louisiana, 391 U.S. 145, 171 (1968), Justice Black wrote that although the selective incorporation doctrine was "perhaps less historically supportable" than total incorporation, he nonetheless supported it because "most importantly for me, the selective incorporation process has the virtue of having already worked to make most of the Bill of Rights' protections applicable to the States."

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[1] E.g., NAACP v. Alabama, 357 U.S. 449, 462 (1958) (opinion of the Court joined by Black, J.); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

[2] Public Utilities Comm'n v. Pollak, 343 U.S. 451, 466 (1952) (separate opinion).

I am sure that many of Justice Black's former law clerks share my concern that superficial comparisons of his philosophy with that of Judge Bork do a great disservice to the Justice's memory. The record makes clear that in their theories of interpretation and in their guiding commitments these men differ in the most fundamental ways.

I would be grateful if you would make copies of my letter available to the other members of the Senate Judiciary Committee.

Sincerely,

Stephen J. Schulhofer
Frank and Bernice J. Greenberg
Professor of Law and
Director of the Center for Studies
in Criminal Justice

APPENDIX

Selected opinions, joined by Justice Hugo Black, in which constitutional protection for non-enumerated rights is recognized:

EDWARDS v. CALIFORNIA, 314 U.S. 160, 177 (1941). Justice Black joined a concurring opinion in which Justice Douglas argued that "the right to move freely from state to state," though not expressly recognized by the constitution, is implicitly protected by the privileges and immunities clause of the Fourteenth Amendment. The opinion stated: "[T]his right is not specifically granted by the Constitution. Yet before the Fourteenth Amendment it was recognized as a right fundamental to the national character of our Federal government. . . . That the right was implied did not make it any the less 'guaranteed' by the Constitution." 314 U.S. at 178.

SKINNER v. OKLAHOMA, 316 U.S. 535 (1942). Justice Black joined the opinion of the Court holding that a law permitting sterilization of certain habitual criminals violated the equal protection clause of the Fourteenth Amendment. Central to the Court's analysis was the decision to subject the law to "strict scrutiny" because it affected "one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence of the human race." 316 U.S. at 541.

PRINCE v. MASSACHUSETTS, 321 U.S. 158 (1944). Justice Black joined the opinion of the Court which, while upholding a challenged state regulation, based its analysis on the proposition that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." 321 U.S. at 166.

BOLLING v. SHARPE, 347 U.S. 497 (1954). Justice Black joined the opinion of the Court holding public school segregation to violate the due process clause of the Fifth Amendment. The Court said that "liberty" under the due process clause "is not confined to freedom from bodily constraint. . . [It] extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." 347 U.S. at 499-500.

SCHWARE v. BOARD OF BAR EXAMINERS, 353 U.S. 232 (1957). Justice Black wrote the opinion of the Court finding a denial of due process in the state's refusal to admit the petitioner to practice at the bar. Justice Black reasoned that whether the practice of an occupation were deemed a "right" or a "privilege," the state could not impose qualifications that did not have a "rational connection with the applicant's fitness," and could not treat the opportunity to practice as merely "a matter of the State's grace." 353 U.S. at 239.

KENT v. DULLES, 357 U.S. 116 (1958). Justice Black joined the opinion of the Court holding that the right to foreign travel "is part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." 357 U.S. at 125. [Subsequently, in Aptheker v. Secretary of State, 378 U.S. 500, 518 (1964)(concurring opinion), Justice Black criticized the theory of "liberty" to which he had subscribed in Kent.]

LOVING v. VIRGINIA, 388 U.S. 1 (1967). Justice Black joined the opinion of the Court which struck down the state's law prohibiting interracial marriage. The Court's opinion held not only that the law violated the equal protection clause but also that it deprived the petitioners of "liberty" within the meaning of the due process clause. In the latter holding, the Court rested on the proposition that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." 388 U.S. at 12.

The **Chairman**. Mr. Kliesmet, we will not wait for your colleagues. We will begin with you if that's all right, unless there is objection from my colleagues.

Mr. Kliesmet, welcome. We are delighted to have you here, and I mean that sincerely, and I appreciate your willingness to wait.

Let me ask you all to stand to be sworn, please.

Do you swear the testimony you are about to give is the truth, the whole truth and nothing but the truth so help you God?

Mr. **Johnson**. I do.

Mr. **Kliesmet**. I do.

Mr. **Hampton**. I do.

TESTIMONY OF A PANEL CONSISTING OF HAROLD JOHNSON, ROBERT KLIESMET, AND RONALD HAMPTON

Mr. KLIESMET. Thank you, Mr. Chairman and members of the committee. I am Robert Kliesmet, the president of the International Union of Police Associations, AFL-CIO. Mr. Michael Leibig, our general counsel and adjunct professor in public employment law and labor policy at the Georgetown University Law Center is with me.

I was a police officer in the Milwaukee police department from 1955 to 1984, the last 15 years of which I served as its union leader. I, like many of you, am pulled both ways by Judge Bork's nomination. Let me explain that.

I am president of a police union. I speak solely for practicing police officers, not police administrators. We represent over 20,000 police officers from department throughout the country. Moveover, the AFL-CIO represents an additional 80,000 police officers. We are the largest police organization which exclusively represents practicing police officers.

It is Judge Bork's impact on them and how they provide quality police services about which I am most concerned. At first President Reagan's nomination of Judge Bork to the Supreme Court seemed to be a simple issue.

He has been portrayed as an advocate of strong law enforcement. Judge Bork is reported to be skeptical about the exclusionary rule as I am. He has also endorsed capital punishment as I have. Both positions are favored by most of our members.

If we stop here, we could support him. The issue is far more complicated, however. A careful examination of whether Judge Bork should be supported by working police officers and their organizations requires scrutiny of recent Supreme Court decisions which affect police on the beat and as a consequence the citizens they serve.

First a comment about the exclusionary rule in *Miranda*. Judge Bork has viewed the rule and *Miranda* as tool aimed primarily at deterring police misconduct. It has been far more than that. It has resulted in an increase in the quality of policy training. As a consequence police officers today are better versed in the law and constitution, have gained sensitivity to the individual rights of citizens and are far more sensitive to the community needs. Both are now part of the professional values and culture of policing.

But let me return to the primary question. How would Judge Bork's confirmation to the Supreme Court directly affect police on the beat and subsequently citizens. My written testimony reviews four recent decisions—*Garcia* v. *San Antonio Metropolitan Transit Authority*, a 1985 case affecting the wages and hours of police; *Loudermill* v. *Cleveland Board of Education*, a 1985 case protecting police job security; *Rankin* v. *McPherson*, a 1987 case protecting speech and associational rights in the police work place which is vital to representing police officers; and lastly, *O'Connor* v. *Ortega*, a 1987 decision affecting privacy rights and unreasonable searches of police officers on the job.

Given the short time I have, I will concentrate only on *Garcia* and *Loudermill*. First, *Garcia*. This decision held that the Fair

Labor Standards Act applies to all State and local public employees. It overturned an earlier 1976 court ruling. The *Garcia* decision initiated major adjustment in police wages, hours and working conditions.

Many of you will recall that my union worked long and hard with Congress to adjust to the *Garcia* decision in developing the Fair Labor Standards amendments of 1986. Judge Bork has indicated that he would overrule *Garcia*.

When he appeared before this committee, he was asked to point to an area in which he would respect precedent even in face of his disagreement with the reasoning upon which that precedent was placed.

He indicated that he would respect the Court's current rules with regard to the commerce clause except in recently developing areas as relating to federalism. A review of *Garcia* leaves little doubt that *Garcia* is the recent precedent with which Judge Bork disagrees and to which he would not defer.

Let me point out that the *Garcia* decision is a five to four decision. Chief, then Associate, Justice Rehnquist led the dissent. He wrote that his position will, in time again, command that support of the majority of the Court. We are appalled at that prospect.

Senator Metzenbaum who led the activity to achieve 1986 amendments to the act will remember the confusion we went through then, the havoc caused by constant whiplashing, the Wage and Hours Act unconstitutional in 1977, constitutional in 1985, unconstitutional again with the new majority will even be worse.

It will cause great harm to the working lives of professional police officers and undermine their confidence in the constitutional guarantees they are pledged to protect.

The second case, *Loudermill* and police officer job security. To understand our concern about this decision, you must understand the working life of a police officer. The popular view of the police officer, crime fighter operating under strict command and control, enforcing the law, is not only wrong, it masks the truth about the nature of police work.

Oh, it is partially true, but most of our work, well over 80 percent, fall outside of these descriptions. Most of the time we deal with troubled people in some sort of need, the homeless, the inebriated, troublesome youths, emotionally disturbed persons let loose on the streets without help, and others.

We negotiate, counsel, rebuke, mediate, refer and interpret. The list is long. But understand. Most of the situations with which we deal are ambiguous. Who is to say who is right or wrong in most disputes? We handle them alone and without the benefit of on-the-scene supervision or strong policy guidance, and they are full of possibilities for making mistakes.

Fortunately, our record is good. Very few of the incidents get out of hand, and the very invisibility of most of our actions testifies to police skill in handling them. But mistakes are bound to be made. The ambiguity of those incidents assures it. And, frankly, police administrators have not had a good record of handling individual officers when well-intentioned mistakes have been made.

We have no quarrel with disciplining incompetent officers as long as fair procedures are used, but we do believe that practicing police officers who, in the course of their duty are confronted with almost unbelievably complex and ambiguous situations, are in need of rigorous due process protection from arbitrary discipline.

Given police administrators' practices in the past, we have great concern about *Loudermill*. In 1985, the Court held that a tenured public employee could not be discharged without a pre-discharge hearing.

Beyond that, the Court outlined a whole series of employment security protections which are very important to the working police officer. The *Loudermill* decision resulted in seven separate written opinions and, of course, has thereby caused a great deal of litigation concerning the meaning and extent of the rights of police officers faced with discipline.

Again, Chief Justice, then Associate Justice Rehnquist, wrote a strong dissenting view concerning limits he would place on the protection afforded public employees by the 14th amendment.

Given what Judge Bork has said and written about the 14th amendment, we fear that Judge Bork would further jeopardize this important protection. His views on the first and fourth amendment raise additional concern about the on-the-job rights of working police officers reviewed in *Rankin* and in *Ortega*. Mr. Leibig and I are prepared to discuss these concerns in response to any question you may have.

In sum, Judge Bork's position on the exclusionary rule and capital punishment makes him superficially attractive to some police administrators. On close examination, however, it is clear that a strong stance for law and order is only partially found in those positions. Part of any strong stance on law and order must include concern for the equity and workplace needs of the practicing police officer who daily struggles to assure for citizens not only law and order but the benefits of constitutional guarantees. Judge Bork's insensitivity to these issues is the reason we respectfully recommend that you deny him your consent to this appointment.

I thank you.

[Statement follows:]

Testimony of

ROBERT B. KLIESMET

PRESIDENT

I am Robert B. Kliesmet, President of the International Union of Police Associations (IUPA), AFL-CIO. Mr. Michael Leibig, IUPA's General Counsel and an adjunct professor in public employment law and labor policy at the Georgetown University Law Center, is here with me. I was a police officer in the Milwaukee Police Department from 1955 to 1984, the last 15 years of which I was the leader of the Milwaukee Police Association.

I face a difficult decision on the nomination of Robert Bork to the Supreme Court. I, like many of you, am pulled both ways by his nomination. Let me explain.

I am President of THE police union. I speak solely for practicing police officers, not police administration. IUPA is the police affiliate of the AFL-CIO. We represent over 20,000 police officers from departments throughout the country. Moreover, the AFL-CIO represents an additional 80,000 police officers. Other police organizations may claim larger memberships, however, we are the largest police organization which represents exclusively practicing line officers. It is Judge Bork's impact on them and how they provide quality police services about which I am most concerned.

At first, President Reagan's nomination of Robert Bork to the Supreme Court seemed to be a simple issue. He has been portrayed as an advocate of strong law enforcement. Judge Bork is reported to be skeptical about the exclusionary rule -- he has also endorsed capital punishment. Both positions are favored by many of our members.

If we stopped here, we could support him. The issue is far more complicated, however. A careful examination of whether Judge Bork should be supported by working police officers and their organizations requires scrutiny of recent Supreme Court decisions which affect police on the beat and, as a consequence, the citizens they serve. What would be different if Judge Bork were on the court?

A comment on the exclusionary rule before I answer this question. Like most police officers, I resented the rule and along with Judge Bork viewed it and the Miranda decision as tools aimed primarily at deterring police misconduct. But each has also been an important milestone in increasing police professionalism. They have helped us understand that while fighting crime is an important police responsibility, our primary task is to protect our country's treasured constitutional guarantees. As a consequence, police officers today are better versed in the law and constitution, have gained sensitivity to the individual rights of citizens, and are far more sensitive to community needs than in the past. We have little enthusiasm about abandoning the exclusionary rule or Miranda: they are now part of our professional values and culture.

But, let me return to the primary question: How would Judge Bork's confirmation to the Supreme Court directly affect police on the beat and, subsequently, citizens? I would like to review four recent decisions:

Garcia v. San Antonio Metropolitan Transit Authority
469 U.S. 528, 105 S. Ct. 1005 (1985)

Loudermill v. Cleveland Board of Education
470 U.S. 532, 105 S. Ct. 1487 (1985)

O'Connor v. Ortega; and
94 L. Ed. 2d 714 (1987)

Rankin v. McPherson
97 L. Ed. 2d 315 (1987)

First, Garcia. This decision held that the federal Fair Labor Standard Act applies to state and local public employees. It overturned an earlier 1976 ruling (National League of Cities). The Garcia decision initiated major adjustments in police wages, hours and working conditions. Moreover, it resulted in enactment by Congress of the Fair Labor Standard Amendments of 1986. Many of you will recall that IUPA working long and hard with Congress to adjust to the Garcia decision to develop fair wage and hour rules.

Judge Bork has indicated that he would overrule Garcia. Last week before this Committee he was asked to point to an area in which he would respect precedent even in face of his disagreement with the reasoning upon which that precedent was placed. He indicated that he would respect the Court's current rules with regard to the Commerce Clause except in recently developing areas relating to federalism. A review of Garcia leaves little doubt that Garcia is the recent precedent with which Judge Bork disagrees and to which he would not defer. This is consistent with prior statements made by Judge Bork. (see attachment)

Let me point out that Garcia is a 5 to 4 decision. Chief, then Associate, Justice Rehnquist led a dissent. He wrote that his National League of Cities position will "in time again command that support of the majority of the Court."

We are appalled by that prospect. Senator Metzenbaum, who led the activity to achieve 1986 amendments to the Act, will remember the confusion we went through then. The havoc caused by constant whiplashing -- the wage and hour act unconstitutional in 1977, constitutional in 1985, unconstitutional with a new majority -- will even be worse. It will cause great harm to the working lives of professional police and undermine their confidence in constitutional guarantees they are pledged to protect.

Second, Loudermill and Police Officer's Job Security. To understand our concern about this decision, you must understand the working life of a police officer. It is not well understood. The popular view of the police officer -- crime fighter, operating under strict command and control, enforcing the law -- is not only wrong, it masks the true nature of police work. Oh, it is partially true, but most of our work, over 80%, falls outside of these descriptions. Most of the time we deal with troubled people in some sort of need -- the homeless, the inebriated, troublesome youth, prostitutes, emotionally disturbed persons set loose on the streets without help, and others. Often we deal with people in conflict -- merchants and customers, landlords and tenants, husbands and wives, lovers, parents and children. Rarely are they breaking the law when we are called on to deal with them. Yet they all represent problems about which citizens expect us to do something. And we try. We negotiate, counsel, rebuke, mediate, refer, interpret, -- the list is long. But understand, most of the situations with which we deal are ambiguous (who is to say who is right or wrong in most disputes), we handle them alone and without the benefit of on-the-scene supervision or strong policy guidance, and they full of with possibilities for making mistakes. Fortunately, our record is good. Very few of the incidents get out of hand and the very invisibility of most of our actions testifies to police skill in handling them.

But mistakes are bound to be made. The ambiguity of these incidents assures it. And frankly, police departments have not had a good record of handling individual officers when well-intentioned mistakes have been made -- either by the officer or by a citizen who inappropriately makes charges against am officer. One final introductory comment: I am not now talking about incompetent police officers. Every profession suffers from a small number of incompetents. Making mistakes and being incompetent are very different issues, however. We have no quarrel with disciplining incompetent officers -- as long as fair procedures are used. But we do believe that practicing police officers who in the course of their duty are confronted with almost unbelievably complex and ambiguous situations are in need of rigorous due process protection from arbitrary discipline. Given management practices in the past, we have great concern about Loudermill.

In 1985 the Court held that a tenured public employee could not be discharged without a pre-discharge hearing. Beyond that, the Court outlined a whole series of employment security protections which are very important to the working police officer. The Loudermill decision resulted in seven separate written opinions and, of course, has thereby caused a great deal of litigation concerning the meaning and extent of the rights of police officers faced with discipline. Again, Chief Justice, then Associate Justice, Rehnquist wrote a strong dissenting view concerning limits he would place on the protection afforded public employees by the 14th Amendment. Given what Judge Bork has said and written about the 14th Amendment, we fear that Judge Bork would further jeopardize this important protection.

Third, Rankin v. McPherson and Police Associational and Speech Rights. In its last term the Supreme Court re-enforced its long standing commitment to the First Amendment Protection afforded public employees in the work place in its Rankin decision. This protection is extremely important to police officers, especially to police officers who are active in unions or employee associations. First Amendment protections, both with regard to speech and associational rights, are vital to organizing working police officers and representing them with regard to wages, hours, and working conditions.

The Rankin decision was decided by a 5 to 4 split court. Justice Scalia, joined by the Chief Justice, and Justices White and O'Connor, dissented and argued in favor of limiting the First Amendment protection afforded "non-policy making" positions in state and local law enforcement. We fear that were Judge Bork to be added to the Court, these vital protections would be diminished.

Finally, Ortega "Searching the Police". This final example, differs a bit from the others. In its last term the Court in O'Connor v. Ortega, 94 L. Ed. 2d 714 (1987), decided a key case concerning the right of public employees to be protected from unreasonable search and seizure in the work place.

The opinion, however, was again divided and somewhat unclear. Five members of the court felt that the search of a government doctor's desk, files, and pages might have been reasonable, and therefore decided that summary judgment was inappropriate. Five members of the court agreed the doctor had a reasonable expectation of privacy in his office; all members agreed the doctor had a reasonable expectation of privacy in his desk. The four dissenting justices argued that there clearly was not sufficient cause to justify the search.

Justice O'Connor's plurality opinion generated a concurring opinion from Justice Scalia which objected the vagueness of the plurality's opinion:

> The plurality opinion instructs the lower courts that existence of Fourth Amendment protection for a public employee's business office is to be assessed "on a case-by-case basis," in light of whether the office is "so open to fellow employees or the public that no expectation of privacy is reasonable." No clue is provided as to how open "so open" must be; much less is it suggested how police officers are to gather the facts necessary for this refined inquiry. As we observed in Oliver v. United States, "<t>his Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances."
> (cites omitted)

The O'Connor standard threatens to the working police officer's rights to Fourth Amendment protection in the work place. It raises the situation in which a hard working officer could easily return to a departmental locker room after a day investigating a drug case "frustrated by Fourth Amendment technicalities" which prevent his discovery of vital evidence in a case, to find that his personal locker has been searched by the department because the Fourth Amendment protection afforded the police officer in his work place is less than that afforded the criminal suspects he is investigating. We are not certain where Judge Bork would come down between Justice Scalia and Justice O'Connor on this specific issue but his proclaimed hostility to privacy rights worry us.

In sum, Judge Bork's position on the exclusionary rule and capital punishment makes him superficially attractive to some police administrators. On close examination, however, it is clear that a strong stance for law and order is only partially found in these positions. Part of any strong stance on law and order must include concern for the equity and work place needs of the practicing police officer who daily struggles to ensure for citizens not only law and order but the benefits of constitutional guarantees. Judge Bork's insensitivity to these issues is the reason we respectfully recommend that you deny him your consent to this appointment.

Thank you.

ATTACHMENT

The NAACP Legal Defense Fund, Inc., has reported to this Committee on this issue:

Judge Bork, then Solicitor General, personally argued *Usery* on behalf of the United States, and urged that the statute be held constitutional. That argument did not, of course, necessarily reflect his personal views, since the Department of Justice traditionally defends the constitutionality of any act of Congress unless its invalidity is undeniable. In 1982, when *Usery* was still the law, Judge Bork announced that he agreed with the majority in *Usery*, expressing regret only that the Supreme Court did not go further in limiting the authority of Congress:

> Despite my professional chagrin, I agree at least with the impulse that produced the result in *National League of Cities v. Usery*, the case which I lost, which was the invalidation of the amendment to the Fair Labor Standards Act that applied wages and hours provisions to the employees of state and local governments. But I doubt that the case has much generative potential. I doubt that it does more than express an impulse because there is no doctrinal foundation laid in the case for the protection of state rights or state powers...
>
> The opinion, as you know, by Justice Rehnquist, claims that it is one thing for the federal government to displace a state's laws on particular subjects but quite another to regulate the state's activities themselves. Now that distinction, if it is one, is unrelated to the concerns of federalism because it is entirely possible to strip a state of all of its sovereignty either way, either by regulating the state itself or by displacing its policy making function with federal law. (Speech, Federalist Society, Yale University, April 24, 1982, pt.1, pp.2-3)

After *Garcia*, in 1986, Judge Bork reiterated his support for *Usery*, and argued that *Usery* had failed to survive because judges had not been sufficiently activist in attacking the authority of Congress to legislate in areas that affected state sovereignty:

> Looking back, it seems that *National League of Cities v. Usery* was correctly decided. Its weakness, which proved fatal, lay in the opinion's insistence that what one court did was consistent with all prior precedent and in its attempt to draw distinctions that seem dubious. That made the decision vulnerable and subject to attack on its own terms. If federalism is to receive judicial protection, I think courts will have to admit that bright-line tests are unavailable, that prior cases are irreconcilable, and that decisions will turn on such matters as the degree of federal intrusiveness and the vitality of states as police makers. Perhaps a presumption can be established against federal invasions of areas traditionally reserved to the states. Perhaps other, subsidiary criteria can be developed. Would this be unacceptable judicial activism? Perhaps not. There is nothing wrong with judges being active in the defense of real constitutional principles. Activism in is unfortunate form occurs when judges create constitutional principles or move well beyond the allowable meaning of an actual principle. Federalism is, of course, a basic constitutional principle and it is appropriate that its core be defended. (Speech, Attorney General's Conference, January 24-26, 1986, pp.10-11)

Senator KENNEDY. Mr. Hampton.

Mr. HAMPTON. Good evening, Mr. Chairman.

Senator KENNEDY. Good evening.

TESTIMONY OF RONALD HAMPTON

Mr. HAMPTON. My name is Ronald Hampton and I am the National Information Officer for the National Black Police Association. I am a 15-year police officer with the Metropolitan Police Department in Washington, D.C.

I am here today to represent the National Black Police Association, and I am here to testify and go on record in opposition to Robert Bork's nomination to the U.S. Supreme Court.

The National Black Police Association believes that such a decision will profoundly influence the law of the land well into the 21st century. As an organization of persons who are bound to uphold the law, we find it intolerable that such a decision could even be contemplated, for it would make our profession a mockery.

We believe that Robert Bork is a rigid ideologue far outside the mainstream of America's public opinion and, as such, would make our profession not only a mockery but virtually impossible to perform with any integrity.

Mr. Bork has opposed Supreme Court decisions barring judicial enforcement of racially restrictive covenants, upholding parts of the Voting Rights Act of 1965, providing remedies for unlawful school desegregation, and affording housing opportunities for low-income black citizens who have been victimized by government discrimination.

He has rejected the principle of a constitutional right to privacy and would permit the government to intrude on the fundamental privacy aspects of the lives of individual Americans.

He holds an extreme, limited view of first amendment guarantees of the separation of church and State and free speech. He would severely limit the Supreme Court's role in protecting individual liberties and rights. He would slam the court house door on people seeking relief from governmental abuses.

He is a key proponent of Attorney General Edward Meese's notion of original intent which holds that the views of the framers provide only the meaning of the Constitution, ignoring our nation's 200 years of progress, but also denying those of us who were brought here under conditions over which we had no control and those who came later on their own free will any participation in the making of this nation, as is our right under the terms of the Constitution. Clearly, original intent is a vehicle for limiting individual rights without recourse to the courts.

As a law professor, a government official, and as a judge, Mr. Bork has invaded against most of the constitutional protections afforded by the Supreme Court during this modern era.

Each of these issues impacts on the role that black police officers must play in today's society. The nomination of Mr. Bork to the U.S. Supreme Court constitutes a real and threatened obstacle to the contribution of not only black American police officers, but to the profession as a whole.

Therefore, the National Black Police Association asks that you vote no for Robert Bork and allow the Supreme Court to continue the guarantees and protection of our Constitution to all American people.

Thank you very much.

[Prepared statement follows:]

BORK TESTIMONY
Presented
by
Ronald E. Hampton
for the

NATIONAL BLACK POLICE ASSOCIATION

September 30, 1987

DISTINGUISHED PANELIST AND GUESTS,

ON BEHALF OF THE NATIONAL BLACK POLICE ASSOCIATION I AM HERE TO TESTIFY AND TO GO ON RECORD IN OPPOSITION TO ROBERT BORK'S NOMINATION TO THE U.S. SUPREME COURT.

THE NATIONAL BLACK POLICE ASSOCIATION BELIEVES THAT SUCH A DECISION WILL PROFOUNDLY INFLUENCE THE LAW OF THE LAND WELL INTO THE 21ST CENTURY. AS A ORGANIZATION OF PERSONS WHO ARE BOUND TO UPHOLD THAT LAW WE FIND IT INTOLERABLE THAT SUCH A DECISION COULD EVEN BE CONTEMPLATED, FOR IT WOULD MAKE OUR PROFESSION A MOCKERY.

WE BELIEVE THAT ROBERT BORK IS A RIGID IDEOLOGUE, FAR OUTSIDE THE MAINSTREAM OF AMERICAN PUBLIC OPINION AND AS SUCH WOULD MAKE OUR PROFESSION NOT ONLY A MOCKERY BUT VIRTUALLY IMPOSSIBLE TO PERFORM WITH ANY INTEGRITY.

MR. BORK HAS OPPOSED SUPREME COURT DECISIONS BARRING JUDICIAL ENFORCEMENT OF RACIALLY RESTRICTIVE COVENENTS, UPHOLDING PARTS OF THE VOTING RIGHTS ACT OF 1965, PROVIDING REMEDIES FOR UNLAWFUL SCHOOL DESEGRETATION, AND AFFORDING HOUSING OPPORTUNITIES FOR LOW INCOME BLACK CITIZENS WHO HAVE BEEN VICTIMIZED BY GOVERNMENT DISCRIMINATION..

HE HAS REJECTED THE PRINCIPLE OF A CONSTITUTIONAL RIGHT TO PRIVACY AND WOULD PERMIT THE GOVERNMENT TO INTRUDE ON FUNDAMENTALLY PRIVATE ASPECTS OF THE LIVES OF INDIVIDUAL AMERICANS.

HE HOLDS AN EXTREMELY LIMITED VIEW OF THE FIRST AMENDEMENT GUARANTEE OF SEPARATION OF CHURCH AND STATE AND FREE SPEECH.

HE WOULD SEVERELY LIMIT THE SUPREME COURT'S ROLE IN PROTECTING INDIVIDUAL LIBERTIES AND RIGHTS. HE WOULD SLAM THE COURTHOUSE DOOR ON PEOPLE SEEKING RELIEF FROM GOVERNMENTAL ABUSES.

HE IS A KEY PROPONENT OF ATTORNEY GENERAL EDWIN MEESE'S NOTION OF "ORIGINAL INTENT" WHICH HOLDS THAT THE VIEWS OF THE FRAMERS PROVIDE THE ONLY MEANING FOR THE CONSTITUTION, IGNORING OUR NATION'S 200 YEARS OF PROGRESS, BUT ALSO DENYING THOSE OF US WHO WERE BROUGHT HERE UNDER CONDITIONS OF WHICH WE HAD NO CONTROL AND THOSE WHO CAME LATER OF THEIR OWN FREE WILL, ANY REAL PARTICIPATION IN THE "MAKING OF THIS NATION" AS IS OUR RIGHT UNDER THE TERMS OF THE CONSTITUTION. IT IS CLEAR THAT "ORIGINAL INTENT" IS A VEHICLE FOR LIMITING INDIVIDUAL RIGHTS WITHOUT RECOURSE TO THE COURTS.

AND AS A LAW PROFESSOR, A GOVERNMENT OFFICIAL , AND A JUDGE, MR. BORK HAS INVEIGHED AGAINST MOST OF THE CONSTITUTIONAL PROTECTIONS AFFORDED BY THE SUPREME COURT DURING THE MODERN ERA.

EACH OF THESE ISSUES IMPACTS ON THE ROLE THAT THE BLACK POLICE OFFICER MUST PLAY IN TODAYS SOCIETY. THE NOMINATION OF MR. BORK TO THE UNITED SUPREME COURT CONSTITUTES A REAL AND THREATENING OBSTACLE TO THE CONTRIBUTION OF NOT ONLY THE BLACK AMERICAN POLICE OFFICER, BUT TO THE PROFESSION AS A WHOLE.

THEREFORE THE NATIONAL BLACK POLICE ASSOCIATION ASKS THAT YOU VOTE NO ON ROBERT BORK AND ALLOW THE U.S. SUPREME COURT TO CONTINUE TO GUARANTEE THE PROTECTIONS OF OUR CONSTITUTION TO ALL AMERICAN PEOPLES.

END

The CHAIRMAN. Mr. Johnson.

TESTIMONY OF HAROLD JOHNSON

Mr. JOHNSON. Thank you. Before I make my statement, I would like to say to the members of the Judiciary Committee and commend the Senate on their confirmation of Judge Sessions as Director of the FBI. I think the decision was a very fine decision. He is one of the finest law enforcement officers, or can be one of the finest law enforcement officers and protectors of the Constitution of Americans that you could have.

The CHAIRMAN. Thank you.

Mr. JOHNSON. I also commend the Senate on its confirmation of Judge Webster to the Central Intelligence Agency. I think that Judge Webster will bring integrity and the level of performance of the agency back to where it should be for this nation.

Mr. Chairman and distinguished members of the committee, if Judge Bork were currently seated on the Supreme Court of this nation, I firmly believe that I would not be here today representing black law enforcement executives of this nation.

As President of the National Organization of Black Law Enforcement Executives, I represent a membership organization made up of command-level law enforcement officials from local, State, and federal agencies.

Within this membership are a number of chiefs of police, including ten big-city chiefs and 17 federal supervisory special agents in charge of district offices or divisions.

NOBLE is committed to serve and protect. We function in an important dual role within law enforcement and the black community. We are dedicated to providing quality and professional policing to our communities and to America.

In order to maintain and assure our continued role, we vigorously reject the nomination of Judge Robert Bork to the Supreme Court of the United States of America. NOBLE believes that the delicate balance between our mandate to serve and protect versus the preservation of individual rights will be dangerously upset if Judge Bork is confirmed. We believe he will create a legacy that will undermine the concept of balance for generations to follow.

As the replacement for Associate Justice Lewis F. Powell, Judge Bork would be in a position to cast a deciding vote and, as a consequence, create a shorter list of rights and privileges.

Given the insidious tangle of drugs and violence in minority and poor communities, you might expect that a law enforcement organization such as NOBLE would embrace and applaud the freedom to take action that will result, given Judge Bork's broad interpretation of the exclusionary rule and his narrow reading of *Miranda*.

Officers should move more quickly, for example, on known crack houses and against known drug dealers. However, Judge Bork's position on the exclusionary rule and *Miranda* cannot be viewed in isolation.

His rulings vividly display a web of rights and privileges he is unwilling to preserve or protect. His philosophy regarding original intent and judicial restraint undermines the fundamental rights and liberties protected by the Constitution of this nation.

I and many members of NOBLE joined law enforcement and the law enforcement community because we either personally experienced or witnessed police officers in the 1950's and 1960's conducting illegal searches and seizures, improper interrogations, and the arresting of suspicious individuals without probable cause. These acts were all serious infringements upon the rights of individuals.

I joined the police force in 1964. I became a member of the law enforcement community to take a personal role in defending the constitutional rights of all Americans, especially minorities and the poor—rights which have been denied me.

My testimony here today is personal. I am who I am today because of the opportunities afforded me through affirmative action. NOBLE exists today because of affirmative action.

We are committed to ensure that the law enforcement community not only represents those they serve but also are sensitive to their special needs. If Judge Bork is confirmed, I can envision that the hands of time will be turned back to a community of the haves and the have-nots, black versus whites, and the weak against the strong.

I and members of NOBLE are not saying that time will regress if Judge Bork is confirmed. What we are concerned about is that his very presence on the Supreme Court will create the opportunity for the conversation about individual rights and social reform to shift in such a way that the future resembles the past.

As law enforcement executives, our fundamental duties are to serve mankind, to safeguard lives and property, to protect the innocent against deception, the weak against oppression and intimidation, and the peaceful against violence and disorder, and to respect the constitutional rights of all men and women to liberty, equality and justice.

To conclude, we, the members of the NOBLE, reject the nomination of Judge Bork to the Supreme Court. We are committed to live in the present and will not allow the balance of our rights and privileges to be upset in favor of the past.

Mr. Chairman, I thank you.

[Prepared statement follows:]

NATIONAL ORGANIZATION OF
BLACK LAW ENFORCEMENT EXECUTIVES

President
HAROLD JOHNSON
Public Safety Director
Highland Park, MI P D

Immediate Past President
GEORGE NAPPER
Public Safety Commissioner
Atlanta, GA

National Vice President
RONALD D. NELSON
Chief of Police
Berkeley, CA P D

Region 1 Vice President
DONALD C. BURTON
Undersheriff
Camden Co. (NJ) Sheriff's Dept

Region 2 Vice President
MARCELLUS BOLES
Major
Baltimore, MD P D

Region 3 Vice President
MOSES ECTOR
Special Agent-in-Charge
G B I Thomaston, GA

Region 4 Vice President
EDWARD C. BROOKS
Deputy Chief
Chicago, IL P D

Region 5 Vice President
SYLVESTER JONES
Chief of Police
Northwoods, MO P D

Region 6 Vice President
DAN NELSON
Chief of Police
E. Palo Alto, CA P D

Corresponding Secretary
LARRY C. BOLDEN
Deputy Chief
Las Vegas, NV P D

Treasurer
BILLY NORWOOD
Chief, Protective Services
D.C. Government

Financial Secretary
G. HELENA ASHBY
Captain
L.A. Co. Sheriff's Dept

Sergeant-At-Arms
ROBERT F. FAISON
Inspector (Ret.)
U.S. Secret Service

Parliamentarian
STEVE BOWSER
Public Safety Director
Atlanta University Center

ELSIE L. SCOTT, Ph.D.
Executive Director

O'NEAL D. WRIGHT
General Counsel

Judiciary Testimony of Harold L. Johnson
President, National Organization of Black Law Enforcement Executives

Mr. Chairman and Distinguished Members of the Committee:

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As President of the National Organization of Black Law Enforcement Executives (N.O.B.L.E.), I represent a membership organization made up of command level law enforcement officials from local, state, and federal agencies. Within this membership are a number of chiefs of police, including ten big city chief executives, and seventeen federal supervisory special agents-in-charge of district offices or divisions.

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Judge Robert Heron Bork to the Supreme Court of the United States of America.

NOBLE believes that the delicate balance between our mandate to serve and protect versus the preservation of individual rights will be dangerously upset if Judge Bork is confirmed. We believe he will create a legacy that will undermine the "concept of balance" for generations to follow. As the replacement for Associate Justice Lewis F. Powell, Judge Bork would be in the position to cast the deciding vote and as a consequence create a shorter list of rights and privileges.

Given the insidious tangle of drugs and violence in minority and poor communities, you might expect that a law enforcement organization such as NOBLE would embrace and applaud the freedom to take action that would result, given Judge Bork's broad interpretation of the exclusionary rule and his narrow reading of Miranda. Officers could move more quickly, for example, on known crack houses and against known drug dealers. However, Judge Bork's position on the exclusionary rule and Miranda cannot be viewed in isolation. His rulings vividly displays a web of rights and privileges he is unwilling to preserve and protect. His philosophy regarding "original intent" and "judicial restraint" undermine the fundamental rights and liberties protected by the Constitution.

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As law enforcement executives, our fundamental duty is to serve mankind: To safeguard lives and property; to protect the innocent against deception, the weak against oppression and intimidation , and the peaceful against violence and disorder. We are sworn to respect and protect the Constitutional rights of all men and women and to ensure liberty, equality and justice.

To conclude, we the members of NOBLE reject the nomination of Judge Bork to the Supreme Court. We are committed to live in the present and will not allow the balance of our rights and privileges to be upset in favor of the past.

Respectfully yours,

Harold L Johnson

Harold L. Johnson, President
National Organization of
Black Law Enforcement
Executives

The CHAIRMAN. Thank you, Mr. Johnson.

Senator Thurmond, any questions?

Senator THURMOND. We are glad to have you gentlemen here.

Mr. Johnson, the name of your organization is the National Organization of Black Law Enforcement Executives?

Mr. JOHNSON. That is correct, Senator.

Senator THURMOND. Are all your members black?

Mr. JOHNSON. No, sir. Some are——.

Senator THURMOND. Well, why do you have "Black" in the title?

Mr. JOHNSON. Because that was the original meeting of black executives that came into the organization. However, we have since our inception brought on many other minority executive officers, including the Chicanos, including members from Saudi Arabia, from Africa, from Haiti and the Caribbean.

We do also have white members, also. In fact, my assistant director, who is white—he happens to be Italian, but he is a proud NOBLE member.

Senator THURMOND. How many white members have you?

Mr. JOHNSON. I count approximately five at this particular time, Senator.

Senator THURMOND. How many?

Mr. JOHNSON. Five.

Senator THURMOND. Five?

Mr. JOHNSON. Yes, sir.

Senator THURMOND. Five white members?

Mr. JOHNSON. Yes, sir.

Senator THURMOND. And how many black members have you?

Mr. JOHNSON. Approximately 1,400 command-level executives.

Senator THURMOND. Fourteen hundred?

Mr. JOHNSON. Yes, sir.

Senator THURMOND. Mr. Hampton, the name of your organization is the National Black Police Association. Are all your members black?

Mr. HAMPTON. About 98 percent——

Senator THURMOND. I can't hear you.

Mr. HAMPTON. About 98 percent of them are black.

Senator THURMOND. Well, how many are white?

Mr. HAMPTON. We have several organizations that have——

Senator THURMOND. What?

Mr. HAMPTON. We have several organizations in our organization that have white members in them, maybe less than one percent.

Senator THURMOND. Now, how many members have you?

Mr. HAMPTON. We represent about 30-some thousand black police men and women in the country.

Senator THURMOND. Thirty thousand?

Mr. HAMPTON. Yes, sir.

Senator THURMOND. Mr. Kliesmet, how many members have you?

Mr. KLIESMET. Twenty thousand, sir.

Senator THURMOND. Twenty thousand. In all, then, you have about 51,400 members, is that right, all three?

Now, it is a little strange that your three organizations are opposed to Judge Bork. We had the Federal Criminal Investigators Association endorsing Judge Bork. We had the Fraternal Order of

Police endorsing Judge Bork. We had the International Association of Chiefs of Police endorsing Judge Bork.

We had the International Narcotics Association of Police Organizations endorsing Judge Bork. We had the National Law Enforcement Council endorsing Judge Bork. We had the National Sheriffs Association endorsing Judge Bork. We had the National Troopers Coalition endorsing Judge Bork. We had the Victims Assistance Legal Organization endorsing Judge Bork.

Together, they constitute over half a million members, over 500,000 members. Now, I believe you say you have about 51,000. That is kind of strange to me. I have worked with law enforcement people all my life. I was a judge and worked with them, and as a lawyer I worked with them and here in the Senate I worked with them.

I sponsored the comprehensive crime bill, trying to help law enforcement people, and I have done everything I could and I just don't understand how your group has gotten straight off from the great majority of the law enforcement people.

I am for law enforcement. I want to help you. I worked with you in the past; I want to help you in the future. How did it happen that you all strayed off from the rest of them?

Mr. HAMPTON. Well, I am not going to begin to speak for the other two, but we have disagreed—I know my organization has disagreed on several other issues with some of those organizations you named and we have worked with some of them on several issues, too.

So there is a common ground and then there is some uncommon ground, and Judge Bork's nomination to the Supreme Court just happens to be one of those issues that we just totally disagree on, but we are still friends.

Mr. KLIESMET. Mr. Chairman?

Senator THURMOND. I would be happy to hear from you, Mr. Kliesmet.

Mr. KLIESMET. I happen to be a member of the National Law Enforcement Council and when they put together the panel, they asked me if I would care to participate in it. And, of course, being an employee representative, a group which is substantially different than any of the others, except parts of the Fraternal Order of Police, I am an elected advocate of law enforcement personnel who believe in collective bargaining.

And in the process they want certain kinds of guarantees, and their dues money has been spent in many cases supporting the *Garcia* decision, the *Loudermill* decision, the *Ortega* decision, and the *Rankin* decision, and they don't want to see it struck down because they have a vested interest in the representation we provide for them.

So I have to break away from those other groups that profess to—and they included me in their 500,000 figure, so we need to subtract 20,000 right off the bat. As a matter of fact, there are only 500,000 law enforcement officers in this country, and somehow they bunched them all together and said we represent half a million. I think it is far from the truth.

Senator THURMOND. Well, the International Union of Police Associations, I believe, is your organization?

Mr. **Kliesmet**. Yes, sir.

Senator **Thurmond**. So you are mainly opposed to him not from the standpoint of law enforcement, but because you represent a union and you are afraid he won't be favorable to the unions. Is that it?

Mr. **Kliesmet**. Not favorable; I am afraid he won't be fair. You know, as I said in my statement, I support the death penalty. I support the change in the exclusionary rule as a practicing police officer, but I have taken on the role of representing police officers who are concerned about the job of policing, as I am, and want to be more satisfied so they can do a better job for the communities they serve.

And on that basis, we don't think Judge Bork would be fair to us and we couldn't maintain that level of benefit for the citizens we work for.

Senator **Thurmond**. Mr. Johnson, do you favor the death penalty?

Mr. **Johnson**. Our membership is split on the death penalty and we have not spoke to the question as yet on the death penalty.

Senator **Thurmond**. Mr. Hampton, do you favor the death penalty?

Mr. **Hampton**. My organization is against the death penalty.

Senator **Thurmond**. It is against it?

Mr. **Hampton**. Yes, sir.

Senator **Thurmond**. Well, maybe that is the reason some of you are opposed to Judge Bork, because I understand he would favor the death penalty. About 80 percent of the American people, according to a poll taken, favor the death penalty. So you are out of tune with a majority of the American people, aren't you?

Mr. **Hampton**. No, sir. Our position has nothing to do with that particular portion of Judge Bork's, you know, position. We, as first-line police officers out there on the street, have seen many of the laws that the courts have come up with wrongly used and citizens abused, and all of that. So our positions are based on the fact that we are out there on the front line where the rubber meets the road and where we see these types of abuses and misconduct taking place every day.

Senator **Thurmond**. Well, after Judge Bork is confirmed to the Supreme Court, I think you are going to be well pleased with him.

Thank you very much.

The **Chairman**. Senator Metzenbaum.

By the way, I say to my colleagues there is a vote on, so if we can finish this panel before the vote is finished, it would be much appreciated.

Senator **Metzenbaum**. Mr. Chairman, I don't intend to speak long, but I do want to say to my good friend and my colleague from South Carolina that I think that this is the first time since I have served here that I have heard any organization asked how many blacks, how many whites, how many pinks, how many women, how many this, how many that.

I really don't care what the race of your membership is. You have got 1,400 members; they are people. I am very proud to have you come down here and testify. I worked with you, Mr. Kliesmet, very effectively in connection with the Fair Labor Standard Act amendments that would have wreaked havoc for not only police officers, but also firemen and many other people in the entire public service area working for cities.

I think your testimony was excellent. I don't know whether we are going to make decisions based upon how many this or how many that. I think it is a rather irrelevant question, and I must say I took a little offense at it. I hope you didn't.

I have nothing further to say, Mr. Chairman.

The CHAIRMAN. The Senator from Wyoming.

Senator SIMPSON. Mr. Chairman, I thank you very much.

It is interesting to have your views on the issues of capital punishment and those things as law enforcement people. I appreciate that. You do differ from the past panelists and I do understand that you have a union tie and you are saying some things; that you believe that Judge Bork would be anti-union or anti-labor. I don't believe that that is reflected in the record.

I just have some cases I would submit to you, and I am going to submit those in the record and I ask you to review those, and if any of those cases in which Judge Bork was the majority writer of the opinions indicates his labor law record should be of concern to you, I would be very interested in that because I don't read that anywhere in those decisions—*Northwest Airlines, United Scenic Artists, NAACP and Donovan, National Treasury.*

I know my time is limited, but if you would give me your response to those cases specifically and tell me what it is in there that concerns you as part of his record, I thank you very much for your testimony.

Senator THURMOND. Mr. Chairman, we have got to go and vote, but in response to the Senator from Ohio, I just wanted to say that you have a right to have your black association, and I certainly have no prejudice against black people and I want you to know that.

But I just wondered why you called it "black" if it wasn't all black. In other words, it is a misleading term; that is all. I am for the law enforcement people, regardless of whether you are blacks or whites or mixed, or what not. I just want you to know that. I want to help you.

Mr. JOHNSON. Senator, if I could respond to you briefly, I am too a member of the International Association of Chiefs of Police and one of our members sits as the fourth vice president on the board of directors of the IACP.

We are all strong on crime, but what we do is what the Congress here also has. We have, if you will, a law enforcement black caucus within that organization, as you have the Congressional Black Caucus, and we think that is good for law enforcement all over.

We are the conscience of the other police agencies here regarding sensitivity. There are some 40,000 police agencies within this nation, but we are still a nation that is basically ruled by small departments.

My membership represents chief executive officers of cities such as Chicago, New York, Detroit, Atlanta, Miami. We are talking about big-crime America, and we are strong on crime.

We have followed—the Supreme Court rulings have made us a better profession and we are doing a much better job at what we are doing. One of the problems—one of the other people has spoke about crime in the black community. We are locking up people every day under the constitutional guidelines laid down by the Supreme Court. The problem we are having is we don't have jails.

The CHAIRMAN. Thank you very much.

Senator Specter.

Senator SPECTER. Mr. Chairman, I know the hour is late and we are voting on the War Powers Act and we have got to get to the vote, but I would just—and I know you men are appearing here really on the union issue as opposed to the law enforcement issue, but I wonder—or perhaps you testified about the law enforcement issue.

I had to be absent for a few moments, but I would be interested in your views of Judge Bork in terms of the record he has established in terms of law, order, justice, et cetera.

The CHAIRMAN. Well, I think, if I may, they did speak to the issues of justice; they did speak to the issues of law. They did not speak to the issues of the union other than one of the witnesses, but I think you will find that all in the record.

I would like to say one thing, by the way. The NAACP is made up of white folks like me, as well as black folks. No one has suggested that the title should be changed from back in the days when black was called "colored." It is still the NAACP. I am a proud member. I think my dues are paid; I will soon find out.

I want you to know that I know Senator Thurmond; he means nothing derogatory by what he is saying, notwithstanding the fact that I think it is totally irrelevant to the question.

Gentlemen, thank you very, very much. I appreciate your time and your effort. It means a great deal to us all that you are here and you are free to go.

Mr. JOHNSON. Thank you.

Mr. HAMPTON. Thank you, Senator.

The CHAIRMAN. Now, what I would like to do, rather than adjourn to go vote—Senator Kennedy, I believe, has a statement, and others may. He has voted. Those who haven't should run and vote and come back.

We will close out this hearing in about 15 minutes. I have a couple of statements. Senator Thurmond has some statements and some things to be put in the record. We have no more witnesses, but we will continue the hearing.

Gentlemen, again, thank you very, very much.

I turn it over to Senator Kennedy.

Senator KENNEDY. Mr. Chairman, I appreciate the opportunity to make a closing statement. First of all, I want to commend Senator Biden for all of his skillful leadership in chairing these hearings, all the more so because this has not been an easy time in his career.

The Democratic Party may have lost an impressive Presidential candidate, but the Judiciary Committee has an impressive chairman and the Senate has an impressive leader and the Constitution has an impressive defender.

The CHAIRMAN. Thank you.

Senator KENNEDY. A number of witnesses have noted how fitting it is that our hearings on Judge Bork's nomination to the Supreme

Court are taking place during the very days when America has been celebrating the bicentennial of the Constitution.

These hearings have provided an unprecedented education for the Senate and for the nation about the Constitution, the Bill of Rights, and the fundamental principles that have built this country and made America great.

Some witnesses, and even some Senators, have deplored the fact that the American people themselves are becoming involved in this debate, but I reject that elitist view, for, after all, the Constitution is a people's Constitution. It belongs to the people, and when the fundamental values of America are at stake, the American people have at least as much common sense about the Constitution as the lawyers do.

The Constitution is not just a dusty piece of antique parchment under glass in a Washington museum. It is a living document that defines our freedoms, defends our liberty, and determines our future. The Senate has its own responsibility to ensure that the Constitution fulfills this role as vigorously in the years to come as it has for the past 200 years.

Everyone who has followed these hearings knows where I stand. From the day of his nomination, I have opposed the confirmation of Judge Bork because of his clear and often-stated opposition to basic values protected by the Constitution.

On absolutely fundamental issues such as equal protection of the laws, the right to privacy, and freedom of speech, Judge Bork is not only outside the mainstream of American Constitutional thought, but far outside the mainstream.

Five little words in the 14th amendment to the Constitution have loomed large in this debate. Those words, "equal protection of the laws," have been at the heart of three peaceful revolutions that have transformed America in our generation.

The civil rights revolution, the revolution of equal rights for women, and the revolution of one man-one vote are three of America's greatest achievements in our lifetime and they must not be rolled back or placed in jeopardy.

The Supreme Court has been more than a silent witness to these revolutions. It has been a leader, not because activist Supreme Court Justices improperly exceeded their role under the Constitution, but because the Founding Fathers meant for the Constitution to be relevant in our modern lives.

Fair-minded Justices have understood that women and minorities do have the right to equal protection of the laws, that no person's vote should count more than any other's, and that the ninth amendment was included in the Bill of Rights for a purpose, and that the Constitution does protect individual citizens from gross intrusions of the government into our families and our private lives.

Judge Bork, if he puts on the robes of Justice Bork, would place these basic values of our democracy and the extraordinary achievements of our lifetime at genuine and substantial risk.

That risk is too great for the Senate to accept. President Reagan has not been able to achieve his ideological agenda for the country through legislation in the Congress and he is not entitled to achieve it through an ideological appointment to the Supreme Court.

The Founding Fathers, in their wisdom, are speaking to us today. That is why the Constitution they wrote requires the consent of the United States Senate before any person is appointed to the Supreme Court and receives the awesome power to have the last word about the meaning of the Constitution in our daily lives.

America does not want to go back to the more troubled days of the past or reopen the settled issues of the last 30 years. Based on his record of a lifetime and the record of these hearings, that is the direction in which Judge Bork is likely to seek to take this country, and that is a direction in which America should not and must not go.

I urge the Senate Judiciary Committee to vote to reject this nomination, and if the White House chooses to press it to a vote on the Senate floor, I urge the Senate to reject it.

We will recess for a few moments, subject to the call of the chair.

[Recess.]

The **Chairman**. The hearing will come to order.

A couple of things necessary to close the public hearings out. Senator Thurmond informs me that he has checked with all of his Republican colleagues, and I have with our Democratic colleagues. It is agreed that the vote will be—we will not meet tomorrow. That meeting will be canceled.

We will meet October 6th, Tuesday, at 2:00 p.m., at which time we will vote. I am sure there will be some discussion, but we will vote on the nomination of Robert H. Bork to the Supreme Court of the United States of America.

And we are seeking a unanimous consent agreement on the floor so no one will object to our meeting. The only thing that could possibly change the time would be if somehow there was objection on the floor and we had to move the hearing up because of the Senate rules, but I don't anticipate that.

We had a number of statements and letters submitted to the committee for inclusion in the record and they will be included.

The **Chairman**. The record will be held open to receive statements from a number of witnesses who have asked to submit testimony.

I yield to any of my colleagues who might like to make a comment or statement. Senator Thurmond.

Senator **Thurmond**. Thank you, Mr. Chairman. Senator Humphrey earlier said he would submit for the record a memorandum rebutting the attacks on Judge Bork's judicial record made by Arizona attorney John P. Frank.

I ask that the staff memorandum on that point submitted by Senator Humphrey be made a part of the record.

The **Chairman**. Without objection.

[Information follows:]

Response to Submission by John P. Frank

In a written submission to the Senate Judiciary Committee, John P. Frank alleges that Judge Bork is a judicial activist, hostile to the rights of minorities, and in favor of limited first amendment speech protections. He bases these and other subsidiary conclusions on his reading of Judge Bork's opinions for the United States Court of Appeals for the District of Columbia Circuit. The charges are not supported by the evidence.

After noting that Judge Bork has written "a little more than a hundred published opinions" during his five and one-half years on the U.S. Court of Appeals, Mr. Frank makes the outlandish accusation that Judge Bork "is not a big or fast producer, and there is a real question about his ability to cope with the Supreme Court workload." The evidence tells a different story. In five and one-half years on the D.C. Circuit, Judge Bork has written 117 majority opinions for the court. During the same five and one-half year period, Judge Ruth Ginsburg wrote 111 majority opinions, Judge Mikva 126, and Judge Wald 148. A recently published study of D.C. Circuit decisions for a one-year period between May 1986 and June 1987 calculated the average length of time each judge took to issue an opinion from the date of oral argument. According to this study, Judge Mikva took an average of 4.8 months to issue an opinion, Judge Buckley 6 months, Judge Bork 6.2 months and Judge Robinson 35.8 months. While the study does not include Judge (now Justice) Scalia, he took an average of 7.8 months to issue an opinion during his last year on the D.C. Circuit.

Mr. Frank restricts his analysis to twenty cases. He concedes that "so small a sample cannot [provide] a full picture." In fact, Judge Bork participated in 416 cases from the time of his appointment to the appellate court until his nomination. He joined the majority 95 percent of the time. He wrote the majority opinion in 117 cases, and dissented on average in only four cases per term. In his five and a half year tenure on the Court of Appeals, the Supreme Court has, with just one exception, denied certiorari in every appeal from his majority decisions, and six opinions by Judge Bork--three dissents and three dissents from denial of rehearing en banc--have been reviewed and in large measure adopted by the Court.

It cannot seriously be claimed that a judge who joins with the majority in 396 out of 416 cases, is successfully upheld by the Supreme Court six times, has never been reversed by the Supreme Court, and is reversed by the D.C. Circuit but once in an opinion written by Judge Bork himself, can be guilty of the misconduct alleged by Mr. Frank. If Mr. Frank's charges against Judge Bork were true, surely Judge Bork's "activism" and his hostility to constitutional liberties would have prompted his colleagues on the appellate bench and the Supreme Court to correct his erring ways. At bottom, Mr. Frank's submission proves only that an arbitrary selection of cases, often unrelated and misleadingly summarized, can completely distort even an appellate record as remarkable as Judge Bork's.

As to the specific categories singled out by Mr. Frank, an examination of the complete record rebuts the charges.

I. THE FIRST AMENDMENT

In the area of first amendment freedom of speech, Judge Bork issued a decision widely hailed as one of the most important in the past twenty years, extending the protection of the first amendment in light of the growing threat and reality of libel suits against newspapers.[1] He ordered the D.C. subway system to display an anti-Reagan poster.[2] He has protected broad categories of speech from censorship, including commercial speech,[3] scientific speech,[4] and the speech of general cable television programmers.[5] He has repeatedly made the principled argument that first amendment protection of the freedom of the press should extend as well to the broadcast media.[6]

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[1] Ollman v. Evans, 750 F.2d 970 (1984) (Bork, J., concurring).

[2] Lebron v. Washington Metropolitan Transit Authority, 749 F.2d 893, 896 (D.C. Cir. 1984).

[3] FTC v. Brown & Williamson Tobacco, 778 F.2d 35 (D.C. Cir. 1985)

[4] McBride v. Merrell Dow and Pharmaceuticals Inc., 717 F.2d 1460 (D.C. Cir. 1983).

[5] Quincy Cable TV v. FCC, 768 F.2d 1434 (D.C. Cir. 1985).

[6] Branch v. FCC, No. 86-1256, slip op. (D.C. Cir., July 21, 1987); TRAC v. FCC, 801 F.2d 501 (D.C. Cir. 1986); Loveday v. FCC, 707 F.2d 1443 (D.C. Cir.), cert. denied, 464 U.S. 1008 (1983).

Mr. Frank ignores or mischaracterizes these decisions. Instead, he focuses on Finzer v. Barry, where a conservative action group challenged a D.C. ordinance prohibiting hostile picketing within 500 yards of an embassy. Mr. Frank criticizes Judge Bork's majority opinion in Finzer v. Barry, which upheld the constitutionality of the statute, as "an extraordinary restriction of First Amendment freedoms." This characterization is extravagent. The law in question was enacted by Congress, signed by one President and enforced by his successors, upheld several years ago by a unanimous panel of the United States Court of Appeals, upheld again by the local District of Columbia courts, upheld by the District Court in Finzer, and upheld by a majority of the panel which heard the appeal. If his ruling in Finzer places Judge Bork at the extreme end of some spectrum, then it is only fair to note that that end is crowded with Congressmen, Presidents, and other judges as well.

In any event, the statute at issue in Finzer arose in a special context: international law, including a treaty to which the United States is a signatory, requires that host governments protect foreign embassies from violence and insult. Adherence to our international obligations was held by the Court to constitute a sufficiently compelling interest to justify a restriction on speech limited to a five hundred foot radius around foreign embassies in Washington D.C. The Court took seriously the government's statement that diminishing the protection we accord foreign embassies would lead to reciprocal withdrawals of protection of our diplomats abroad, and also gave weight to the fact that American police are forbidden from entering foreign embassies without express permission.

Mr. Frank appears to concede most of this. His only real complaint is that even though our international obligations require only that we forbid hostile demonstrations, we ought to forbid friendly ones as well in order to be evenhanded. This was the position of the dissent. The majority was persuaded, however, that increasing the amount of speech to be prohibited would render the regulation more constitutionally problematic. This is certainly an issue over which reasonable men and women can differ, but it is somewhat ridiculous to chastise a judge for being insensitive to first amendment values because he declined to require Congress to ban more speech than was currently prohibited.

Mr. Frank's criticism of Telecommunications & Research Action Center v. FCC, 801 F.2d 501 (1986) (TRAC), ignores the legal issues and misrepresents the case. In TRAC, Judge Bork reaffirmed his belief that the first amendment requires freedom from state control over the editorial decisions of the media and at the same time solidly demonstrated that he will faithfully apply precedent with which he disagrees. The case involved a challenge to the FCC's decision not to apply certain forms of political broadcast regulation, such as the fairness doctrine, to a new medium called teletext, which is textual programming broadcast over previously unused portions of the broadcast spectrum.

In TRAC, Judge Bork explicitly set forth the view that the broadcast media are as fully entitled to the protection of the first amendment as the print media. Like Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), this is a classic illustration of how Judge Bork's judicial philosophy allows and indeed requires him to apply the original meaning of the first amendment to modern conditions that the Framers could not have foreseen.

In the end, the majority opinion in TRAC, which Judge Scalia joined, is a vote for the public interest and the First Amendment. The Court held that Congress did not codify the Fairness Doctrine, and that the FCC acted within its discretion in concluding that the public interest was best served by not subjecting a new broadcast technology, teletext, to fairness doctrine obligations.

Mr. Frank completes his free speech analysis with the charge that Judge Bork's decision in Loveday v. FCC, 707 F.2d 1443 (D.C. Cir. 1983), "nullifies the right of the public to know who is behind the propaganda they receive." Mr. Frank also says the case shows Judge Bork to be untroubled by the "possibility that economic power may control communication." Neither the facts of the case nor Judge Bork's opinion support these misleading accusations. The tobacco industry sponsored public advertisements opposing an initiative campaign directed at tobacco interests. The FCC ruled that the Communications Act did not require the industry to identify itself as the sponsor of the ads. Mr. Frank is no doubt aware that Congress delegated broad authority to the FCC to regulate the airwaves. Mr. Frank therefore must also be aware that in reviewing FCC decisions a judge does not decide whether "economic power" in this country "controls" communication, whatever that may mean. Nor is the 1934 Communications Act a disclosure act dealing with the public's "right to know" who sponsors advertisements.

II. THE INTERESTS OF MINORITIES

In the instance of "minorities," Mr. Frank admits the "cases are too diverse to permit much generalization." Yet this does not stop him from making the unfounded charge that "one way or another, the minorities regularly and routinely lose." This loose and reckless charge implies a racial bias nowhere in evidence in Judge Bork's five year tenure on the court. It is contradicted by Judge Bork's often stated view that race stands at the core of the fourteenth amendment prohibition on denial of due process or the equal protection of the laws. And the "evidence" supporting Mr. Frank's characterization--three FCC cases, one civil complaint against the police department, and a case turning on standing doctrine -- in no way establishes the proposition for which it is offered.

To begin with, the citation of FCC cases having nothing to do with civil rights as somehow demonstrating hostility to minorities surpasses even the broadly tolerant bounds of heated partisan debate. Judge Bork wrote for the majority in all three FCC cases, and two of three were unanimous opinions. Indeed, in all three cases, it was Congress' delegated arm, the Federal Communications Commission, that initially held against petitioners. At bottom, Mr. Frank accuses Judge Bork (and by association the D.C. Circuit and the FCC) of racist insensitivity for no other reason than that minority petitioners were denied the relief they requested in administrative law cases. Mr. Frank makes no mention of the legal issues at stake and offers no defense on what appears to be his remarkable assumption that petitioners before the FCC deserve special treatment based on the color of their skin.

Mr. Frank mischaracterizes Black Citizens for a Fair Media v. FCC, 719 F.2d 407 (D.C. Cir. 1983) as a "discrimination" case. The issue in that case involved an across-the-board change by the FCC in its license renewal system, not any kind of discrimination against any minority group. In the past, the FCC had required broadcasters to file extensive paperwork with renewal applications. The Commission subsequently concluded that most filings satisfied or exceeded operating guidelines, and that public comments against a broadcaster's programming were the best vehicle for bringing violations to the FCC's attention. Therefore, the Commission sought to simplify its renewal procedures to make filing more efficient, while continuing to rely on public participation as the primary means of detecting violations of the public service obligation.

Judge Bork's opinion for the majority held that the FCC did not violate the Communications Act or the Administrative Procedure Act by modifying the renewal system. Significantly, the majority noted that the FCC did not intend through the new system to establish a lower and more lenient standard for broadcasters. On the contrary, the Commission believed that it could maintain its historical high degree of broadcaster compliance with the streamlined system.

Mr. Frank also plays fast and loose with National Latino Media Coalition v. FCC, 816 F.2d 785 (D.C. Cir. 1987), by asserting that Judge Bork "refused" to decide the case -- thereby conveying the implication that this refusal was motivated by the fact that some of the plaintiffs represented a minority group. In fact, the unanimous panel opinion simply concluded that the plaintiff's case was not ripe for review by the D.C. Circuit because the FCC had never attempted to enforce the disputed rule regarding lotteries for broadcast licenses. Judge Bork's opinion for the court stated explicitly that "if a tie-breaker lottery is [ever] used to resolve some future proceeding, the aggrieved applicant at that time will be fully able to seek review of the Commission's actions in this court." 816 F.2d at 789. Ample Supreme Court precedent dictated that the D.C. Circuit not review the case until the agency decision was final -- and Mr. Frank does not contend otherwise.

Similarly, Mr. Frank suggests that in ICBC Corp. v. FCC, 716 F. 2d 926 (D.C. Cir. 1983), Judge Bork ruled against the plaintiff because he did not want to allow a "black oriented AM radio station to expand into the night time to give more minority coverage." Statement at 8. In fact, the black-owned station asked the FCC to waive its rule designed to prevent signal interference among AM radio stations. Judge Bork's opinion for the court affirmed the FCC's denial of the waiver after concluding that the agency had given "meaningful consideration" to the station's nontechnical, service-related arguments for the waiver.

Mr. Frank also cites Judge Bork's decision in Carter v. District of Columbia, 795 F.2d 116 (D.C. Cir. 1986), as proof of his prejudice against minorities. In an opinion authored jointly by Judges Ruth B. Ginsburg and Bork, the court unanimously held that evidence of five instances of police misconduct and of the deaths of seven persons involved in confrontations with the police did not suffice to show a policy of deliberate police misconduct on the part of the city. Mr. Frank appears to suggest that the court erroneously failed to find an established policy of police misconduct. But this ignores the controlling Supreme Court precedent that a municipality may be subjected to liability under § 1983 not "based on theories of respondeat superior," but only on "a fault-based analysis." Oklahoma City v. Tuttle, ___ U.S. ___ (1985). Thus, in the absence of an express municipal policy, a plaintiff must show a course deliberately pursued by the city, "as opposed to an action taken unilaterally by a nonpolicymaking municipal employee." Id. at ___. The opinion by Judges Ginsburg and Bork carefully applies these principles o the case at hand, concluding: "If the evidence plaintiffs presented here were adequate to make out a § 1983 case, then practically every large metropolitan police force, it would seem, could be targeted for such liability." 795 F.2d at 123.

Mr. Frank also objects to Judge Bork's opinion in Haitian Refugee Center v. Gracey, 809 F.2d 794 (D.C. Cir. 1987), which held that a third-party refugee center had no standing to challenge the Coast Guard's policy of stopping on the high seas Haitian aliens suspected of attempting to migrate to the United States illegally. Mr. Frank asserts that "there would appear to be clear standing within the rule of Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982)." But Judge Bork did apply Havens, and in fact found that the Center had alleged an injury sufficent to confer standing. What Professor Frank fails to mention, however, is that the injury requirement is but one component of the Supreme Court's well-established test for standing to sue. Applying that test, Judge Bork found that the Center had neither satisfied the causation requirement for standing nor shown that it was a proper party to raise the legal rights and interests of third parties not before the Court.

III. JUDICIAL ACTIVISM

Mr. Frank's charge of "judicial activism" is entirely unpersuasive. Typically, it is said, a "judicial activist" imposes his own preferences instead of applying the law. Judge Bork, by contrast, has dedicated his legal career to the twin goals of keeping the courts within their properly limited sphere in a democratic society, yet aggressively applying the understanding of Congress and the Framers and Ratifiers to protect rights granted under law. That is the antithesis of judicial activism, and it explains why, to substantiate his implausible claim, Mr. Frank is reduced to crudely labelling several of Judge Bork's opinions as examples of "activism" and "policymaking."

In Crowley v. Schultz, 704 F.2d 1269 (1983), Judge Bork, joined by Judge Wright and Judge Edwards, disposed of a claim by plaintiffs to attorney's fees under the Back Pay Act. Appellants filed their suit at a time when the Back Pay Act made no provision for attorney's fees. In 1978, the Civil Service Reform

Act augmented Back Pay Act relief to include "reasonable attorney fees," but Congress specifically barred payment of attorney's fees in administrative proceedings commenced prior to passage of the Reform Act. After a careful and searching inquiry of the Reform Act's structure and legislative history, Judge Bork found on behalf of a unanimous court that the plaintiffs were not entitled to reimbursement.

Mr. Frank has no quarrel with this decision, yet he cites Crowley as evidence of Judge Bork's willingness to ignore Congress's will solely on the basis of a concurring statement by Judge Bork. That concurrence was written to make it clear that no decision was rendered directly on the Back Pay Act, "lest an apparent misreading of the Back Pay Act becomes established law through inattention." Mr. Frank would mischaracterize this clarification as a holding, whereas in fact Judge Bork was engaging in the common -- and entirely appropriate -- judicial practice of making clear both what the court has and has not decided in a given case.

Mr. Frank makes the untenable claim that Judge Bork ignored "a very clear statute" in McIlwain v. Hayes, 690 F. 2d 1041 (D.C. Cir. 1982). In reality, Judge Bork's majority opinion for the court adhered faithfully to the explicit language of the Food, Drug and Cosmetic Act, which requires manufacturers to show that color additives for food are safe before they can be sold. Congress created an exception to the Act that allowed additives to be sold for a "transitional" period while manufacturers tested their safety, and gave the FDA discretion to extend the transitional period, consistent with public health and continued testing. The plaintiffs argued that the FDA had violated the law by extending the transitional period several times. The D.C. Circuit, with Judge Bork writing for the majority, upheld the agency because the statute set no limit on the number or duration of extensions allowed. Thus, the statute was indeed "very clear" -- but its clear meaning is not the one urged by Mr. Frank.

Jersey Central Power & Light Co. v. Federal Energy Regulatory Commission, 810 F. 2d 1168 (D.C. Cir. 1987), also cited by Mr. Frank, is hardly an example of "judicial activism." Jersey Central made a substantial investment in a nuclear power plant, but when the project was no longer feasible Jersey Central abandoned the plant, and thereby its investment. In an attempt to recover its unamortized costs, Jersey Central asked FERC if it could include them in its rate base, with a rate of return sufficient to cover carrying charges on its debt and on the preferred stock portions of that unamortized investment. In response, FERC issued an order that summarily and without explanation excluded the unamortized portion of the investment from the rate base. Jersey Central appealed to the D.C. Circuit, and in its first encounter with the case, a unanimous panel affirmed FERC, holding that the "end result" test that requires a rate order to be "just and reasonable" applies only to those assets which FERC rules allow to be included in the rate base.

After the initial opinion was issued, a majority of a panel exercised its discretion to grant rehearing, because the panel found FERC's response to Jersey Central's petition seriously deficient. The panel concluded that, under the "end result" test, Jersey Central's allegations that FERC's order would prevent it from access to the capital markets and could bankrupt it entitled Jersey Central to a hearing at which the truth of those representations could be assessed. The en banc court then reheard the case, and Judge Bork's majority opinion reached this same conclusion.

Mr. Frank gives the misleading impression that the opinion for the court held for the utility on the merits, when in fact the opinion simply granted a hearing to resolve the issue. Apart from that, Mr. Frank makes no attempt to challenge Judge Bork's persuasive analysis of why the "end result" test provides more protection for a utility's ability to attract capital and remain solvent than FERC's grudging interpretation of that test would have allowed.

Mr. Frank's criticism of Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), grossly distorts the holding in that case, which involved a refusal by a national van line to contract with local carrying agents on terms that the van line found unacceptable. Mr. Frank's assertion that the opinion approves the legality of a "boycott" makes misleading use of that charged term. As Judge Bork made clear, any agreement to deal on specified terms is in a sense a boycott of those who will agree only to other contractual terms. Further, the Supreme Court's decision in Northwest Wholesale Stationers v. Pacific Stationery & Printing, 105 S. Ct. 2613 (1986), clearly mandated that the challenged arrangement in Rothery be measured according to the "rule of reason" -- that is, upheld as lawful if it had procompetitive, rather than anticompetitive, effects -- rather than deemed invalid per se.

In ruling that the challenged arrangement was unlikelty to have anticompetitive effects, Judge Bork gave great weight to the fact that Atlas Van Lines held merely six percent of a market that, measured by Justice Department guidelines, had a competitive structure overall. (Mr. Frank's comparison of Atlas Van Lines' market power to the monopoly power of John D. Rockefeller's standard oil is, for this reason, rather mystifying.) Judge Bork's holding that the challenged arrangement was lawful thus rested primarily on the uncontroversial conclusion that Atlas Van Lines did not have the market power to impose an anticompetitive result, and only secondarily on the finding that the arrangement at issue had efficiency-producing potential. Contrary to Mr. Frank's assertion, Judge Wald did not dissent from Judge Bork's opinion, but concurred "in the result and in much of the reasoning." 792 F.2d at 230. Judge Ruth Bader Ginsburg joined Judge Bork's opinion in full, the Supreme Court denied certiorari. 107 S. Ct. 880 (1987).

Mr. Frank attacks Judge Bork's opinion in Lebron v. WMATA as "activist" because of a statement that "in extreme situations prior judicial restraint on the basis of falsity may be appropriate." 749 F.2d at 899 (emphasis in original). Mr. Frank states that Judge Bork "cites no authority for this proposition." Statement at 6. This is simply untrue. Immediately following Judge Bork's statement is a citation to Tomei v. Finley, 512 F. Supp. 695 (N.D. Ill. 1981) and an explanation that in that case a court granted a preliminary injunction forbidding the use in political advertising of the acronym 'REP' by the Representation for Every Person party because the acronym falsely implied affiliation with the Republican party.

Moreover, Mr. Frank takes Judge Bork's sentence wholly out of context. Judge Bork was contrasting an administrative agency's prior restraint unfavorably with a prior judicial restraint which, in some extreme cases, may in fact be constitutionally permitted because the individual has the benefit of judicial review of the government's action. Not content merely to find that the prior restraint was unconstitutional because WMATA's judgment was simply wrong -- the objected to advertisement was not misleading -- Judge Bork was going further and attacking WMATA's general practice. Indeed, this was activism, not improper activism "strik[ing] at the vital heart of the free speech concept" as Mr. Frank falsely suggests, but legitimate activism in defense of the First Amendment.

Mr. Frank also cites Dronenburg v. Zech, 746 F.2d 1579 (D.C. Cir. 1984), as "the best known example of Judge Bork's extremism." Statement at 7. This is a suprising conclusion indeed. Two years after Judge Bork's opinion in Dronenburg held that neither the Constitution nor the Supreme Court's privacy decisions prevented the Navy from discharging a homosexual, the Supreme Court held in Bowers v. Hardwick, 106 S. Ct. 2841 (1986), that the state may constitutionally prosecute a homosexual under its sodomy laws -- and Justice Powell joined in that holding.

What is more, Judge Bork did not use Dronenburg as an "occasion for a wholly gratuitous discourse on all of the Supreme Court's privacy opinions of the last twenty-five years." Statement at 7. The plaintiff in Dronenburg argued that those cases compelled a determination in favor of a homosexual officer discharged from the Navy for having sexual relations with an ensign. To have disposed of the case without meeting counsel's arguments would have produced (justifiable) howls of indignation from the plaintiff that the judges were ruling by fiat.

IV. HEALTH & SAFETY

Mr. Frank makes the absurd charge that Judge Bork opposes nuclear safety, and nowhere is Mr. Frank's bias against Judge Bork more apparent than in his diatribe concerning Judge Bork's majority opinion in Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983). The NRC had issued an order amending Boston Edison's license to operate its Pilgrim Nuclear Power Station. The amendments required Boston Edison to develop a plan to remedy deficiencies in its management of the plant. Boston Edison did not challenge the order, but the Attorney General of Massachusetts -- who supported the order -- attempted to intervene to obtain a hearing in order to argue that additional restrictions and conditions should be added to Boston Edison's license. The relevant statute allows intervention by "any person whose interest may be affected by the proceeding." The NRC denied intervention on the grounds that the only issue it would consider in this particular enforcement proceeding was whether its order should be sustained -- not the broader issues the Attorney General wished to raise -- and that therefore this "proceeding" did not adversely affect the interests the Attorney General sought to represent.

Thus, as both Judge Bork's majority opinion and Judge Wright's dissenting opinion recognized, the issue before the court was not whether the Attorney General of Massachusetts could intervene if the proceeding included consideration of the broad issues he sought to raise. If the proceeding had included those issues, intervention would have been appropriate. The crucial question, therefore, was whether the NRC could limit the scope of the proceeding, as it claimed to have done, to whether its order should be sustained -- so that a hearing would need to be held only if the utility or some intervenor chose to oppose that order (which no one did).

Judge Bork held for the majority that the NRC possessed the authority to limit the scope of the proceeding in this manner. But that ruling was extremely narrow. As Judge Bork pointed out, the Attorney General could petition the NRC to modify Boston Edison's license, and thus was "in no sense left without recourse by the NRC's denial of intervention." 725 F.2d at 1382. Furthermore, "automatic participation at a hearing may be denied only when the Commission is seeking to make a facility's operation safer. Public participation is automatic with respect to all Commission actions that are potentially harmful to the public health and welfare." Id. at 1383 (emphasis added).

Mr. Frank never mentions the narrow issue before the court -- whether the NRC could define what issues would be addressed in one of its own proceedings -- nor does he mention the important limits on the court's holding. Instead, he makes two claims: first, that "Judge Bork is not inclined to extend himself much in favor of nuclear safety," and second, that "Judge Bork's opinion holds that the attorney general should be excluded because there is insufficient interest in behalf of the people of the state to permit him to participate." As to the first claim, it suffices to note that judges are not supposed to "extend" themselves in order to rule in favor of one side or the other; judges are expected to interpret and apply the law impartially. As to the second claim, it is clear that Judge Bork believed, as his opinion states, that the Attorney General did have a sufficient interest "in behalf of the people of the state" to support a petition to have the NRC make additional changes to Boston Edison's license. The issue was not the sufficiency of the Attorney General's interest, but whether that interest had been raised in the proper proceeding. The court did no more than rule that the Attorney General had chosen the wrong proceeding in which to air these issues. Whether one agrees or disagrees with that ruling, it obviously does not stand for the sweeping contention Mr. Frank imputes to Judge Bork -- that "there was no public interest in letting the people be heard."

Mr. Frank is also critical of Judge Bork's opinion in San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26 (D.C. Cir. 1986). Significantly, Mr. Frank does not undertake to discuss, or even bother to identify, the legal issues in the case. Instead, Mr. Frank simply recites the facts and concludes that Judge Wald's dissent "is extremely persuasive." Of course, judges not infrequently differ in deciding whether an agency's application of its own regulations is consistent with the language of the regulations and is not arbitrary and capricious. But that is not evidence of extremism, and the reasonableness of Judge Bork's position is borne out by the fact that Judges Mikva and Edwards, two of the court's more liberal judges, joined his opinion.

Mr. Frank similarly oversimplifies and mischaracterizes Judge Bork's decision in American Cyanamid, 741 F.2d 444 (D.C. Cir. 1984). The issue in the case was not, as Mr. Frank suggests, whether "the way to keep the plant safe was to deprive women of their childbearing capacity." Statement at 15. The Administrative Law Judge's findings of fact in a related proceeding, together with an opinion by the Court of Appeals concerning the technological infensibility of reducing lead levels past a certain point in the lead pigment industry, led Judge Bork to conclude that the employer could not reduce the lead levels in its lead pigment department to make it safe for fetuses. The issue was simply whether, under these circumstances, the company had exposed the women to "recognized hazards" under the Occupational Safety and Health Act by adopting a policy that women in their childbearing years could not work in the department unless they were sterile, and by telling them that they could be surgically sterilized. The issue was not whether the women could be sterilized or whether they should be compensated for having undergone sterilization. The women had been sterilized years before, and a Title VII sex discrimination claim had already been settled with the women receiving a substantial sum. The only thing at stake before Judge Bork was whether the company had violated the OSHA Act and was required to pay to the federal government -- not to the women -- a $10,000 fine. To suggest that Judge Bork's sensitive opinion -- which is full of expressions of concern for the "most unhappy choice" to which the women were put -- endorsed sterilization as a means of keeping the plant safe is to engage in demagoguery of the worst kind.

V. MISCELLANEOUS CASES

Mr. Frank also criticizes Judge Bork's unanimous opinion in FTC v. Brown and Williamson Tobacco Co., 778 F.2d 35 (1985), in which Judge Edwards and then Judge Scalia joined. A manufacturer of low-tar cigarettes had claimed its cigarettes delivered only one milligram of tar. A standard FTC test measuring tar supported this claim -- but evidence showed that actual smoking by persons, not FTC machines, delivered tar in the range of three to seven milligrams. The trial court found that the manufacturer's one milligram claim, though literally true, was inherently deceptive. Judge Bork's opinion expressly recognized the first amendment protection accorded commercial speech, upheld the lower court order enjoining the manufacturer from advertising that its cigarette delivers one to two milligrams of tar, and flatly rejected the manufacturer's claim that the law required direct survey evidence of consumer deception.

Nonetheless, Mr. Frank find something to criticize -- that part of Judge Bork's opinion overturning one aspect of the district court injunction which prohibited the manufacturer from devising a new testing system to measure tar, even if the manufacturer clearly informed consumers that the test differed from the commonly used FTC procedure (which has never purported to be the only lawful testing method). This ruling was a careful effort to ensure that constitutional speech was not impermissibly burdened by a prior restraint, yet Mr. Frank derides it as "mechanical" or "part of a spirit which wishes to nullify public health and safety regulations." That criticism demonstrates a failure to understand the constitutional dimensions of prior restraints on speech, and distorts the facts in a case broadly protective of consumer rights.

Mr. Frank's criticism of Judge Bork's opinion in United States v. Singleton, 759 F.2d 176 (D.C. Cir. 1985), rehearing en banc denied, 763 F.2d 1432, is too conclusory to merit extended treatment. Mr. Frank claims that this case is "a good example of dealing with criminal matters as though they were simply puzzles or games and not problems of individual responsibility and individual liberty." Quite the contrary. Singleton involved the issue whether evidence that had already been determined sufficient to support a guilty verdict in a criminal case could be excluded on a subsequent motion to suppress following the grant of a new trial. Joined by Judge Scalia, Judge Bork held that the "law of the case doctrine" required that the evidence be admitted, because "reliability is the test both for the sufficiency of the evidence to support a verdict and for the admissibility of evidence to survive a motion to suppress," and because there was no reason why "reliability should be judged differently" as between these two inquiries. 763 F.2d at 1433. This emphasis on the substantial identity of the two tests looks through legal technicalities to the heart of the issue. That is hardly the kind of formalism that would justify Mr. Frank's remark.

Finally, Mr. Frank takes issue with Judge Bork's opinion in Restaurant Corp. of America v. NLRB, 801 F.2d 1390 (D.C. Cir. 1986), which denied enforcement to an NLRB decision that an employer committed an unfair labor practice by discharging two employees for engaging in union solicitations in violation of the employer's no-solicitation rule, while permitting non-union collections among employees for birthday and going away gifts. Prior to this case, the Board had never based a finding of disparate enforcement on the kind of social solicitations involved here. Indeed, on several occasions, the Board expressly declined to make such a finding on the basis of virtually identical facts. As Judge Bork's opinion pointed out, the Board offered no explanation for its departure from its past precedent. Under settled principles of administrative law, that failure required the court to deny enforcement of the Board's order. Judge (now Justice) Scalia, a noted scholar and jurist in the field of administrative law, fully agreed with Judge Bork's position and concurred in his opinion.

Senator **Thurmond**. Mr. Chairman, I would like to request that we leave the record open for submission of testimony by any group that requested to testify but was unable to do so due to the length of the witness list.

Some of those groups that have contacted me and requested to testify in favor of the nomination of Judge Bork were New Yorkers for Bork, National Association of Evangelicals, Washington Legal Foundation, National Institute for Government and Politics, Citizens for God and Country, Citizens for Decency for Law, the Heritage Foundation, as well as a number of others.

The **Chairman**. Without objection, they will all be entered into the record.

Senator **Thurmond**. Now, Mr. Chairman, is that everything? Is the hearing complete now?

The **Chairman**. Yes. I would just like to thank some staff, but I think the Senator from Alabama wants to make a statement, also.

Senator **Heflin**. Well, Mr. Chairman, this brings us to the close of these hearings and I first want to commend you for the fairness by which you have conducted these hearings.

The **Chairman**. Thank you.

Senator **Heflin**. We have heard a lot of charges and all sorts of misrepresentations, I am referring to before the hearings started and I might say that there were a lot of distortions and inaccuracies published about you and how you would conduct the hearings.

I think that everybody throughout the hearings has felt that you have been completely fair. I think that everybody on the Republican side. The Democratic side and that third element, the undecided side, will say that you have been completely fair, and I appreciate your fairness in this.

You have had a number of things that have happened, but I don't think anything has influenced your decision and done anything that would make it anything other than completely impartial.

The **Chairman**. Thank you.

Senator **Heflin**. And I would like to say as a point of personal privilege that I have been in this caucus room now on Contra and Iran arms hearings and these hearings, and it seems to me that I have been in this caucus room or somewhere under the Craig lights and these television lights.

And I will say that I will be delighted to leave it and my eyes may be able to revert back to 20–19 as a result of it. So I am delighted that it has come to an end, but I do appreciate your effort. I appreciate Senator Thurmond's effort. As always, he is very energetic, always asks good questions.

I think the whole committee has performed well, with maybe my exception, but I do feel like the hearings have been informative, helpful, and very impartially conducted.

The **Chairman**. I thank my colleague.

Senator Thurmond.

Senator **Thurmond**. Mr. Chairman, in concluding I just want to take a minute and give a little résumé and then make a statement. Some of the individuals who testified on behalf of Judge Bork are a former President of the United States, Gerald Ford; a former Chief Justice of the United States, Warren Burger.

Then we had six former Attorneys General—Edward Levi, Griffin Bell, Elliot Richardson, William French Smith, Herbert Brownell, and William Rogers; and Lloyd Cutler, a former counsel to President Jimmy Carter.

We had two governors, Governor James Thompson of Illinois, and Governor Thornburgh of Pennsylvania. We had seven law school deans who testified yesterday, and representatives of eight national law enforcement organizations with a membership of over 500,000 members.

We had a large number of former presidents of the American Bar Association. We had a former HUD Secretary, Carla Hills. We had three former deputy solicitors general and two former assistant attorney generals for antitrust, among many others.

Now, Mr. Chairman, in closing I want to say that I think the hearings have been worthwhile and good, and I want to associate myself with the statement made by Senator Heflin. And I want to take this opportunity to express to you my sincere appreciation for the fair and reasonable manner in which you handled these hearings.

I don't know of anyone who would have conducted it in a fairer manner than you did. I have always found you to be fair when you were the minority member and I was chairman, and since you have been chairman and I am the minority member, I have found you reasonable and it has been a pleasure to work with you.

In conducting these hearings, you have stood by your reputation for being fair and just and reasonable.

The CHAIRMAN. Well, thank you. I thank all my colleagues, and particularly you and Senator Kennedy. I just attempted to follow on the tradition you have set, and I appreciate it very much, but enough said about me and the hearings.

I would like to say one last thing. This has been a logistically complicated undertaking and I think a great deal of credit—it sounds like we are congratulating ourselves much too much here, but the staff has had a great deal to do in terms of just making things flow smoothly, beyond the substantive intellectual input they have placed into this.

And I would like to particularly thank Diana Huffman, who has run these hearings from the majority side, and Duke Short and others from the minority side. And I am going to put in the record, because I don't want it to sound like a mutual admiration society, a list of the key staff persons on all the Senators' staffs, minority and majority, who have worked to make these hearings flow as smoothly as they could, and hopefully as fairly as was possible.

[List follows:]

STAFF MEMBERS

Carol Allemeier, John Bentivoglio, Jane Berman, Sharon Blackman, Paul Bland, Stef Cassella, Michele de Sando, Laurie Gibson, Mark Gitenstein, Scott Green, Diana Huffman, Debra Karp, Kim Lasater, Cindy Lebow, Ron Legrand, Bill Lewis, Diane Lowe, Phil Metzger, Steve Metalitz, Tabb Osborne, Debby Pascal, Kathy Peterson, Jeff Peck, Darla Pomeroy, Tracey Quillen, Andy Rainer, Chris Schroeder, Phil Shipman, Pete Smith, Andy Tartaglino, Marc Ficco, Nanda Chitre, Jodi Tuer, Kevin Wilson, Peter Oxman, John Ungar, Evelyn Ying, Lisa Metz, Duke Short, Frank Klonoski, Melissa Nolan, Jack Mitchell, Dennis Shedd, Linda Greene, and Bill Rothbard.

Lisa Defusco, Carol Hamburger, Jeff Robinson, Michael Russell, Ann Harkins, John Podesta, Jody Silverman, Liz Tankersley, Larry Rasky, Leeann Inadomi, Beth Donohue, Ana Gregg, Deborah Leavy, Jennifer Nelson, Jack Suber, Kay Morrell, Nathalie Blackwell, Bill Myers, Carolyn Osolinik, Annie Rossetti, Melinda Nielsen, Mamie Mills, Deborah Walden, Gary Craig, Robert Maagdenberg, Eddie Correia, Margaret Morton, Steve Hilton, Neal Manne, Ellen Lovell, Joe Jamele, Theresa Alberghini, Jill Friedman, Marianne Baker, Meg Murphy, Lori Shinseki, Chris Dunn, Caryl Lazzaro, Cheryl Matcho, John Trasvina, Abby Kuzma, Jean Leavitt, Randy Rader, Dick Day, Jeffrey Blattner, Sandra Walker, Karen Kremer, Monique Abacherli, George Milner, Jack Foster, and Jerry Ray.

Peggy Hammrick, Jackie Agnolet, William Duran, Kelly Dermody, Peter Coniglio, Matt Johnson, George Smith, Edward Baxter, Matthew McCoy, Cecilia Swensen, Mary Hartman, Alice Finn Gartell, Kim Helper, John Somerville, Denise Addison, Ann Bishop, Grace McPherson, Jo Meuse, Jennifer Dickson, Elizabeth Gardner, William "Bill" Hart, Eloise Morris, Tony Biancuzzo, Jennifer Blackman, Tom Young, Mark Kover, Tom McIsaac, Liz Capdevielle, Sam Gerdano, Dort Bigg, Darryll Fountain, Tara McMahon, Lynwood Evans, Elizabeth McFall, John Leader, Tracy Essig, George Carenbauer, Mansel Long, Joyce Biancuzzo, Roger Cole, Betty Lanier, Judith Lovell, Carlton Betenbaugh, Denise Milford, Mary Lucero, Deabea Walker, Wanda Baker, and Tricia Thornton.

The CHAIRMAN. We will have no more public witnesses, and unless there are further statements——

Senator THURMOND. I would just like to thank Duke Short of my staff for the great work he has done, and also Frank Klonoski, the assistant investigations chief on our staff as well as Melissa Nolan, my investigations clerk. And I thank Diana Huffman of your staff and others who have cooperated.

People don't realize the good work these staff members do and I just want to express my deep appreciation to staff on both sides.

The CHAIRMAN. As my colleagues on my left and right both know, when we go home, even though some of the times it was 8:00, 9:00, 10:00, 11:00 at night, the staff stays here for another three or four hours to get things ready for the next day, and we appreciate it very much.

The list I have includes majority and minority staff, and I will have more to say about both of them at the executive committee meeting.

These public hearings on the nomination of Robert H. Bork are ended.

[Whereupon, at 5:35 p.m., the hearings were closed.]

POST-HEARING CORRESPONDENCE BETWEEN JUDGE BORK AND THE COMMITTEE

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON D C 20001

ROBERT H BORK
UNITED STATES CIRCUIT JUDGE

October 1, 1987

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

I would like to thank you and the other members of the Committee for your courteous and insightful questions during my appearance before the Committee. They confirmed my belief that discussion and debate are essential to growth and change in the law. In response to several concerns raised by Senator DeConcini, I would also like to take this opportunity to set out at somewhat greater length my views on the issues of gender discrimination under the Equal Protection Clause and privacy rights.

I. Equal Protection

On the gender discrimination question, it has been suggested that I previously maintained that women and members of other non-racial groups were not covered by the Equal Protection Clause, but then changed my view in connection with the confirmation hearings. This is simply inaccurate and, I suspect, stems in large part from confusion about the scope and basis of my criticism of modern equal protection analysis.

There are two basic questions presented when reviewing an equal protection challenge to a legislative classification. The first question is whether the individual disadvantaged by the classification is within the coverage of the Equal Protection Clause. The second question is what standard of review is employed in assessing the validity of the classification.

With respect to the first issue, the scope of coverage under the Fourteenth Amendment, I have always believed that women are subject to the protection of that provision. A judicial "interpretivist" or "intentionalist" like myself always looks first to the language of the constitutional provision to discern its meaning. Any understanding of the Equal Protection Clause as being inapplicable to women would seem to be directly contrary to the plain language of the Amendment, which prohibits denying "any person" equal protection under the law. Indeed, in my 1971 Indiana Law Review Article, I criticized Supreme Court equal protection cases such as Goesaert v. Cleary, 335 U.S. 464 (1964), which upheld discrimination against women bartenders, as "improper and intellectually empty". Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L. J. 1, 12 (1971).

The sole focus of my criticism in this area has been the method by which the Supreme Court chooses varying levels of judicial review for different groups in our society -- the so-called "tier" or "group" approach.

Under this approach, the Court adjusts the level of judicial review depending upon the Court's perception of the relative political power of the group being disadvantaged. If the Court determines that a particular group is a "discrete and insular minority" or otherwise unlikely to succeed politically, it provides the group with "special protection" under the Equal Protection Clause in the form of heightened judicial scrutiny of any classification affecting that group. Suspect classifications, such as race or ethnicity, are subject to "strict scrutiny" and are invariably impermissible as a result. Various other "groups" -- aliens, illegitimate children, women, and so on -- are subject to different, more lenient standards of review.

I did not and do not believe that this group-based approach is an appropriate or consistent method of analyzing an equal protection claim. First, determining which groups are entitled to special protection is an inherently subjective process which necessarily involves the judiciary in ad hoc intrusions into the democratic process. Judges are forced to pick and choose among various elements of society, favoring some and disfavoring others, without any guidance from the text of the Constitution or any principle that can be neutrally applied in various cases. For this reason I have criticized the "protected groups" theory as propounded by Professor John Ely because it "channels judicial discretion not at all and is subject to abuse by a judge of any political persuasion." Catholic University Speech, March 31, 1982.

There is an additional difficulty with the group approach. Since the Court announced that it was protecting "discrete and insular" minorities there was difficulty in explaining why the clause applied to women, a group that is actually a slight majority of the population. Indeed, under the group approach, it would be difficult to explain why the clause should apply to more than racial minorities since newly freed blacks were the focus of concern when the fourteenth amendment was ratified.

If literally applied, an approach based on special solicitude for "discrete and insular" minorities would not only preclude scrutiny of gender classifications but would lead to other absurd results. For example, convicted murderers would be granted "special protection" since they are a discrete and insular minority and certainly without political influence. Considerations of this sort gave me intellectual difficulty in seeing how a group approach could justify extending the clause beyond race and, perhaps, ethnicity, although I also thought that the gender discrimination involved in Goesaert v. Cleary, should have been invalidated rather than upheld.

I really did not begin to resolve this difficulty until I became aware of Justice Stevens' suggestion in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), that the group approach be dropped and a rational basis test be substituted. As he wrote:

> In my own approach to these cases, I have always asked myself whether I could find a "rational basis" for the classification at issue. The term "rational," of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word "rational" - for me at least - includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.
>
> The rational-basis test, properly understood, adequately explains why a law that deprives a person of the right to vote because his skin has a different pigmentation than that of other voters violates the Equal Protection Clause. It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. None of these attributes has any bearing at all on the citizen's willingness or ability to exercise that civil right. We do not need to apply a special standard, or to apply "strict scrutiny," or even "heightened scrutiny" to decide such cases.
>
> In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a "rational basis." The answers will result in the virtually automatic invalidation of racial classifications and in the validation of most economic classifications, but they will provide differing results in cases involving classifications based on alienage, gender, or illegitimacy. But that is not because we apply an "intermediate standard of review" in these cases; rather it is because the characteristics of these groups are sometimes relevant

> and sometimes irrelevant to a valid public purpose that the challenged laws purportedly intended to serve.

Id. at 452-454 (footnotes omitted).

This seems to me to provide a much more coherent methodology for application of the Equal Protection Clause than does the group approach. It applies the clause to all persons as individuals. Under my view, all persons, including women, illegitimate children, aliens, and others are entitled to protection from classifications which do not rest upon a reasonable basis in fact.

That is, the Equal Protection Clause prohibits unreasonable distinctions among all persons; it does not afford special protection to certain groups. In every instance, the question is whether the trait being used to distinguish among citizens is in fact relevant because it actually tells the legislature something about a person's needs, abilities, or merit. If it is not a relevant trait to which a reasonable legislature would attach significance, then it is invidious discrimination and should be struck down.

It seems to me that this method of equal protection analysis is both more objective and more faithful to the language and intent of the Equal Protection Clause. A judge who claims adherence to the framers' intent and to neutral principles must search for a single standard which can be applied to all laws that distinguish between individuals on any basis. The search must begin with core concern of those who drafted the Fourteenth Amendment which is, of course, racial classifications.

The central tenet of the Fourteenth Amendment is that race is an unreasonable basis upon which to judge an individual's worth or status in the community. As Justice Stevens said, race is an attribute over which the individual has no control, which cannot be altered, and which tells society nothing about the individual's moral worth or ability. It is per se "unreasonable" for a legislature to make distinctions between individuals based on a trait which is so utterly irrelevant to any valid legislative goal.

In applying the Equal Protection Clause to gender classifications, a judge must refer to the framer's concern with race for guidance. Gender, like race, is an immutable trait. It is a status over which the individual exercises no control, and it indicates nothing about a person's moral or intellectual stature. Since gender is irrelevant to almost all human activities, virtually any statute which limits the opportunities open to women because of their sex would not have a reasonable basis in fact.

For example, in the Goesaert case, which I referred to earlier, the Supreme Court upheld a restriction on the opportunity of women to work in bars. Under my analysis, the law would clearly violate the Equal Protection Clause. There is no reasonable basis in fact for distinguishing between men and women in such a situation. The physical differences between men and women have no bearing on their relative abilities in this field. The same is true of virtually every employment situation. One's gender is irrelevant to one's ability as a lawyer, doctor or accountant, and any restriction on women in any of these fields would be as unreasonable as a law which disfavored people with blue eyes.

By focusing on the factual differences between individuals, the reasonable basis test distinguishes between laws which rest on genuine distinctions between persons and those based upon mere stereotypes. A law which limits the combat duties of women in the armed forces may indeed have a reasonable basis. It may be a fact that certain battlefront tasks require a physical strength or speed which very few women possess. Outside of the narrow areas where physical differences between the sexes are relevant, the reasonable basis test would operate to strike down all laws based upon mere habit or assumption. Distinctions based upon outmoded stereotypes can never satisfy a requirement that they have "a reasonable basis in fact" because they are in essence counterfactual, they ignore the factual similarities between persons in favor of unsupported assumptions.

The results in cases like Reed v. Reed, 404 U.S. 71 (1971), and Frontiero v. Richardson, 411 U.S. 677 (1973), would not change under my reasonable basis analysis. In Reed, the Court struck down a provision of the Idaho Probate Code which established an absolute preference for men over women in the appointment of administrators of estates. Reed was the first victory for women under the Equal Protection Clause, and the test applied by a unanimous court was remarkably similar to my own. The Court stated:

> A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Reed, 404 U.S. at 76 (citation omitted). The preference for male administrators in Reed was not based on any factual difference between men and women, rather it was the product of an unthinking and unreasonable stereotype.

In Frontiero, the Supreme Court concluded that an Air Force regulation prohibiting women from claiming their spouses as dependents on the same basis as men offended the concept of equal protection. Four justices would have elevated sex to the category of suspect classifications applying "strict scrutiny."

Justices Stewart and Powell joined by Chief Justice Burger and Justice Blackmun, applied the rational basis test as announced in Reed. The result for all eight Justices was the same: the preference for men rested on the outmoded stereotype that men are "breadwinners" and women are dependent upon them. Under my view, the same result would follow. The law had no reasonable basis in fact as applied to servicewomen like Sharron Frontiero, whose husband was a student dependent on her for a large part of his support.

There was some suggestion at the hearings that my rejection of a rigid two- or three-tiered approach was a novel or extreme view. Yet both academics and sitting Justices have expressed their problems with this approach. Thus, in 1972, Professor Gerald Gunther wrote in the Harvard Law Review, "There is mounting discontent with the rigid two-tiered formulation of the Warren Court's equal protection doctrine." Gunther, Supreme Court Foreword: 1971 Term, 86 Harv. L. Rev. 1, 12 (1972). In Chicago Police Dep't v. Mosley, 408 U.S. 92 (1972), Justice Marshall criticized "the abstract dichotomy between two different approaches to equal protection that have been utilized by [the] Court." As noted above Justice Stevens has also made his discontent with a group approach crystal clear. See Cleburne, supra; Craig v. Boren, 429 U.S. 190 (1976) (Stevens, J., concurring).

It has also been suggested that my reasonable basis approach would result in less protection for women, or other nonracial groups that have suffered discrimination, than the current Supreme Court methodology. However, as the discussion above demonstrates, my approach would result in the same or greater protection than that currently afforded women: invalidation of all gender-based distinctions except that narrow category of cases based on genuine biological differences between the sexes. While it is true that the Supreme Court in past eras had upheld gender based discrimination as rational, the same results simply would not obtain today under my analysis.

Under the "three-tier" approach, the rational basis test is the lowest level of scrutiny given to any classification and was often used simply to "rubber-stamp" manifestly irrational distinctions. As previously noted, I criticized this toothless and inconsistent "rational basis" analysis, employed in such gender cases as Goesaert, as far back as my 1971 Indiana Law Review article. Thus, it is simply inaccurate to compare the "rational basis" analysis employed under the three-tier approach as a device for upholding classifications to the much more searching inquiry I would employ. That is why I prefer to refer to the proper approach as a "reasonable basis" test -- to avoid confusing it with the "rational basis" test which has proved wholly unsatisfactory.

Moreover, this comparison fails to recognize that a basic principle of my judicial philosophy is that "it is the task of the judge in this generation to discern how the framers values, defined in the context of the world they knew, apply to the world we know." Ollman v. Evans, 750 F.2d at 995-996 (Bork, J. concurring). As I have testified, this means that the reasonableness of a gender-based classification will change along with the role of women in modern society. Even if the framers of the Fourteenth Amendment believed that imposing second-class citizenship on women was reasonable in the 19th century given "the world they knew", it is certainly no longer reasonable in light of the economic and independent status of women in the "world we know". Accordingly, the Court's view of reasonableness must evolve along with that of society in order to "insure that the powers and freedoms the framer's specified are made effective in today's circumstances." Ibid.

Finally, I should note that I have found that male prisoners state a claim of sex discrimination under the Equal Protection Clause, Cosgrove v. Smith, 697 F.2d 1125 (D.C. Cir. 1983), and that I argued as Solicitor General that single-sex schools were unconstitutional where the all-female school was unequal. Vorcheimer v. School District of Philadelphia, 430 U.S. 703 (1977). Both of these actions involved applying the Equal Protection Clause to gender classifications.

In sum, I think my approach to the Equal Protection Clause is fully consistent with the text and history of the Fourteenth Amendment. The reasonable basis test will provide at least as much protection for women and racial and ethnic minorities as present Supreme Court doctrine. In some areas it will provide more. Under the present "group approach," if a group fails to qualify for "heightened scrutiny" it receives virtually no protection from discriminatory laws. Since under my approach all individuals are protected by the reasonable basis test, members of these groups would be more fully protected from unreasonable and arbitrary laws than they are at present.

II. Right to Privacy

Another area you asked about is the Constitution's protection of individual liberty. As I commented before the Committee, the Constitution protects numerous and important aspects of liberty. For instance, the first amendment protects freedom of speech, press, and religion; the fourth amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures;" and the sixth and seventh amendments protect the right to trial by jury. All of these freedoms and more are fundamental. A judge who fails to give these freedoms their full and fair effect fails in his judicial duty. But to say that a judge must be tireless to protect the liberties guaranteed by the Constitution does not mean that one can find a right to liberty or personal autonomy more expansive than those found in the Constitution. Once a judge moves beyond the constitutional text, history, and the structure the Constitution creates, he has only his own sense of what is important or fundamental to guide his decisionmaking.

More fundamentally, where the constitutional materials do not specify a value to be protected and has thus left implementation of that value to the democratic process, an unelected judge has no legitimate basis for imposing that value over the contrary preferences of elected representatives. When a court does so, it lessens the area for democratic choice and works a significant shift of power from the legislature to the judiciary. While the temptation to do so is strong with respect to a law as "nutty" and obnoxious as that at issue in Griswold v. Connecticut, 381 U.S. 479 (1965), the invention of rights to correct such a wholly, misguided public policy inevitably involves the judiciary in much more difficult policy questions about which reasonable people disagree, such as abortion or homosexual rights. (In saying this, I do not preclude the possibility that some cases I have criticized could be defended on more adequate constitutional grounds than the opinions offered. I think I made that clear at the hearings.)

While a legislator obviously can and should make distinctions between such things as the freedom to have an abortion and the freedom to use contraceptives, a court cannot engage in such ad hoc policy making. A court cannot invent rights that apply only in one case and are abandoned tomorrow in a case that cannot fairly be distinguished. The process of inventing such rights is contrary to the basic premises of self-government and inconsistent application denies litigants the fairness and impartiality they are entitled to expect from the judiciary.

This was the basis of my criticism of Justice Douglas' opinion in Griswold, the case invalidating Connecticut's statute banning the use of contraceptives. To put the decision in perspective, it is important to note that Griswold, even in 1965, was for all practical purposes nothing more than a test case. The case arose as a prosecution of a doctor who sought to test the constitutionality of the statute. There is no recorded case in which this 1879 law was used to prosecute the use of contraceptives by a married couple. The only recorded prosecution was a test case involving two doctors and a nurse, and in that case the state itself moved to dismiss.

This point was made by Justice Frankfurter four years before Griswold in Poe v. Ullman, 367 U.S. 497 (1961), a case rejecting an earlier attempt to have the Connecticut law invalidated. In addition, Justice Frankfurter's opinion took judicial notice of the fact that "contraceptives are commonly and notoriously sold in Connecticut drug stores," and concluded that there had been an "undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books." Id. at 502. Thus, it cannot realistically be said that failure to invalidate the Connecticut law would have had any material effect on the ability of married couples to use contraceptives in the privacy of their homes.

My principal objection to the majority opinion in Griswold was the Court's construction of a generalized right of privacy not tied to any particular provision of the Constitution to strike down a concededly silly law which it found offensive. Justice Black's dissent, joined by Justice Stewart, made precisely the same point:

> While I completely subscribe to the [view] that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of "civilized standards of conduct." Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them.

381 U.S. at 513. Of course, had the state actually sought to enforce the law against a married couple, questions under the fourth amendment as well as under the concept of fair warning would certainly have been presented.

Absent a violation of such a specific, constitutionally granted right of privacy, however, it is difficult to discern the constitutional impediment to the Connecticut law. In my view, Justice Douglas' attempt to do so by creating a free-floating "right to privacy" does not state a principle of constitutional adjudication that was either neutrally derived or which could be neutrally applied in the future.

As I stated in my Indiana Law Review article (page 7):

> If we take the principle of the decision to be a statement that government may not interfere with any acts done in private, we need not even ask about the principle's dubious origin for we know at once that the Court will not apply it neutrally. The Court, we may confidently predict, is not going to throw constitutional protection around heroin use or sexual acts with a consenting minor. We can gain the possibility of neutral application by reframing the principle as a statement that government may not prohibit the use of contraceptives by married couples, but that is not enough. The question of neutral definition arises: Why does the principle extend only to married couples?

> Why, out of all forms of sexual behavior, only to the use of contraceptives? Why, out of all forms of behavior, only to sex? The question of neutral derivation also arises: What justifies any limitation upon legislatures in this area? What is the origin of any principle one may state?

As I went on to note in the article, the "zones of privacy" discussed by Justice Douglas do not really have anything to do with privacy at all. These zones of privacy, I stated,

> protect both private and public behavior and so would more properly be labelled "zones of freedom". If we follow Justice Douglas' next step, these zones would then add up to an independent right of freedom, which is to say, a general constitutional right to be free of legal coercion, a manifest impossibility in any imaginable society. . . . We are left with no idea of the sweep of the right of privacy and hence no notion of the cases to which it may or may not be applied in the future.

Indiana Law Review Article at 9.

With all modesty, my suggestions that the right of privacy was not really about "privacy" as such, that this right would not be applied consistently, and that it would lead the Court into much more difficult moral and social issues, have all proved prophetic.

For example, the "privacy" right recognized in Roe v. Wade, 410 U.S. 113 (1973) -- a right to terminate a pregnancy -- is not really about privacy, but is more accurately described as a right to personal autonomy or liberty. Privacy refers to an interest in anonymity or confidentiality whereas liberty describes freedom to engage in a certain activity. The question in Roe, therefore, is whether any provision of the Constitution recognizes an individual right to terminate pregnancy against state intrusion. The Court's opinion in Roe made no attempt to ground such a right in the Constitution except to say that it was "founded in the 14th Amendment's concept of personal liberty and restrictions upon state action." Id. at 153.

This is my difficulty with the opinion. As Justice White's dissent, joined by Justice Rehnquist, stated, there is "nothing in the language or history of the Constitution to support the Court's judgment," which the dissent termed "an exercise of raw judicial power." The due process clause of the fourteenth amendment provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." If the clause is read as written, then it guarantees that life, liberty, and property will not be taken without the safeguard of fair and adequate legal procedures to challenge the legality of the deprivation. Once such procedures have been given, and the legality of the deprivation established, the due process clause does not establish an independent barrier to the deprivation. If, on the other hand, the clause is read to protect liberty against deprivation regardless of procedures, then the judge must have a theory for deciding which liberties are protected and which are not since no one would suggest that all liberty is immune from state regulation.

So far as I can tell, no one has ever been able to explain why some liberties not specified in the Constitution should be protected and others should not. As far as the Constitution is concerned, when it does not speak to the contrary the state is free to regulate. A judge who uses the due process clause to give substantive protection to some liberties but not others has no basis for decision other than his own subjective view of what is good public policy.

Attempts to read substantive protections of liberty into the due process clause have failed in the past precisely because the clause gives no indication of which liberties are to be preferred to others. In the early part of this century, for example, the Supreme Court read the due process clause of the fifth and fourteenth amendments to protect a generalized liberty of contract, and routinely struck down laws that interfered with that liberty. Thus, in Lochner v. New York, 198 U.S. 45 (1905), the Supreme Court invalidated a New York labor law limiting the hours of bakery employees to 60 hours a week. Similarly, in Adair v. United States, 208 U.S. 161 (1908), the Court struck down a federal law prohibiting interstate railroads from requiring as a condition of employment that its workers agree not to join labor unions. And in Adkins v. Children's Hospital, 261 U.S. 525 (1923), the Court held the District of Columbia's minimum wage law unconstitutional.

As I have said elsewhere, the Supreme Court's modern attempts to use the due process clause as a substantive protection of liberty have also been unconvincing. Although the Court has held in Roe that a woman has a constitutional right to receive an abortion, it has more recently held that consenting adults do not have a constitutional right to engage in homosexual sodomy. See Bowers v. Hardwick, 106 S. Ct. 2841 (1986). Justice White's opinion for the Court in Bowers reasoned as follows:

> It is obvious to us that neither ["the concept of ordered liberty" nor the liberties "deeply rooted in this Nation's history and tradition" formulation] would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots.

Id. at 2844.

The difference between these two decisions illustrates my point that it is difficult, if not impossible, to apply the undefined right of privacy in a principled or consistent manner. It is difficult to understand why abortion is a constitutionally protected liberty and homosexual sodomy is not. Neither activity is mentioned in the Constitution, both involve activity between consenting adults, and "[p]roscriptions against [both activities] have ancient roots."

Some have said that the principle may be that individuals have a constitutional right to use their bodies as they wish. Not only is this principle to be found nowhere in the Constitution, but also its application would invalidate laws against prostitution, consensual incest among adults, bestiality, drug use, and suicide, not to mention draft laws and countless safety measures such as laws requiring the use of seat belts and motorcycle helmets. This principle is thus far too general to support a particular decision without sweeping in these other cases.

As I stated before the Committee, it would be inappropriate for me to give any indication of how I would vote as a member of the Supreme Court should the issue arise again. But suffice it to say that the question would be one of searching for an appropriate constitutional basis and precedent. As I have emphasized not every incorrectly decided constitutional decision should be open to reconsideration.

Although I cannot claim to have exhaustively researched the question, I do not think that the ninth amendment provides any basis for a contrary conclusion. The ninth amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The historical meaning of this amendment is revealed by the circumstances of its adoption. As you are certainly aware, the original Constitution did not contain a Bill of Rights. Rather, it established a national government of enumerated powers. But during the ratification debates, calls were made with increasing frequency by the so-called Anti-Federalists for adoption of a Bill of Rights. The Federalists raised two objections to inclusion of a Bill of Rights. First, it was said to be unnecessary because Congress would have no power to abridge fundamental rights of the people as the general government was one of enumerated, and therefore limited, powers. Second, the Bill of Rights was said to be dangerous because the reservation of certain rights might be read to imply that power was given to the federal government to regulate all others.

Once James Madison became convinced of the need for a Bill of Rights, Madison defended his proposal as follows:

> It has been objected also against the bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I ever heard urged against the admission of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution. (1 Annals of Congress 456 (J. Gales & W. Seaton ed. 1834)).

The clause to which Madison referred was the provision that would later be adopted in somewhat shorter form as the ninth amendment. Thus, it appears that the amendment's instruction that the enumeration "of certain rights, shall not be construed to deny or disparage others retained by the people" was meant to prevent any implication, as Madison put it, "that those rights which were not singled out, were intended to be assigned into the hands of the General Government."

This means that whenever the Constitution does not grant the power to regulate conduct to the federal government, the people have a right to engage in that conduct free from federal interference even though the conduct is not specified in the Bill of Rights. It must be emphasized that the "right" protected by the ninth amendment runs against the federal government when it undertakes to regulate individuals through an unwarranted expansion of its powers. For this reason, it makes little sense either textually or historically to speak of ninth amendment rights enforceable against the states. As I have said elsewhere, if that were the meaning of the ninth amendment, then surely there would have been heated debate in the state ratifying conventions, and litigants and courts would have invoked the amendment in that capacity. That neither occurred, I think, is strong evidence that the amendment was not intended to create federally enforceable rights against the states.

Moreover, even if one agrees with the recent suggestion that the ninth amendment protects natural rights against state and federal intrusion, the nature and scope of those rights is undefined and virtually limitless. For example, John Locke, a thinker whose writings profoundly influenced the framers' view of "natural rights," regarded property and contract rights as among the most important natural rights of men. Accordingly, if the ninth amendment were to be interpreted as a grant of liberty against government intrusion, it would necessarily include the freedom of contract. Of course, this would lead to invalidation of the worker protection legislation struck down by Lochner and its progeny, or any other form of economic regulation that hampers the "right" to contract.

Alternatively, members of the Supreme Court have invoked their own notions of natural law in the past. For example, Justice Bradley's concurrence in Bradwell v. State, 83 U.S. 130 (1973), upholding a law forbidding women from practicing law, states: "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . [The] paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."

But those who now urge reliance on the ninth amendment see a different set of natural rights emanating from the ninth amendment. For example, Professor Tribe filed a brief with the Supreme Court in Bowers v. Hardwick suggesting that one of the rights "retained by the people" under the ninth amendment is the right to engage in homosexual sodomy. Equally plausible are claims that the ninth amendment protects drug use, mountain climbing, and consensual incest among adults. Certainly the text of the amendment makes no distinction among any of these "rights." Therefore, unless the ninth amendment is to be read to invalidate all laws that limit individual freedoms, judges who invoke the clause selectively will be doing nothing more than imposing their subjective morality on society.

Although Justice Goldberg's concurrence in Griswold invoked the ninth amendment, the problems just discussed are, I think, the reason why the Supreme Court has never rested a decision on the ninth amendment. For instance, even Justice Douglas, the author of the majority opinion in Griswold, stated in a concurring opinion in the companion case to Roe v. Wade, that "The Ninth Amendment obviously does not create federally enforceable rights." Doe v. Bolton, 410 U.S. 179, 210 (1973) (Douglas, J., concurring). Unless someone can find a way both to read the ninth amendment to apply against the states and to discover which additional rights are retained by the people, I do not see any principled way for a judge to rely on the clause to invalidate state laws.

There is one final matter I wish to mention. There appears to be some confusion concerning my view of, and the Court's decision in, Skinner v. Oklahoma, 316 U.S. 535 (1942). Skinner held that a state statute requiring sterilization of recidivist robbers but not embezzlers worked "a clear, pointed, unmistakable discrimination," id. at 541, and therefore violated the equal protection clause of the fourteenth amendment. It is important to understand the rationale given by the Court for its decision. The Court did not rely on a substantive due process right to privacy. In fact, the Court declined Chief Justice Stone's invitation in a separate concurrence to decide the case under the due process clause. Instead, the Court rested its decision squarely on the equal protection clause: "The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." Id.

In my 1971 article, I was critical of what I believed to be the Supreme Court's inconsistent application of the equal protection clause. I cited six cases as examples in which the Court both upheld and invalidated challenged classifications. One of the cases I cited was Skinner v. Oklahoma. I did not cite Skinner, or any other case I listed, for the correctness or incorrectness of its holding. Rather, my point was merely that it appeared that "the differing results cannot be explained on any ground other than the Court's preferences for particular values." Indiana Law Review at 12. This was the sum total of my "criticism" of Skinner, and I think it is at best inaccurate to suggest, as some have, that my inclusion of Skinner in a string cite means that I disagree with the decision in the case.

As I stated in my testimony before the Committee, the state's decision to sterilize robbers but not embezzlers may have been indicative of racial bias because the statute operated disproportionately against racial minorities and the poor. If that is true, and if robbery and embezzlement are, as the Court said, "intrinsically the same quality of offense," 316 U.S. at 541, then I think it may be fair to say the state engaged in impermissible discrimination. In addition, I note that sterilization of criminals raises serious and independent questions under the eighth amendment's prohibition on cruel and unusual punishment, questions neither I nor the Court addressed.

I hope that these additional comments prove to be of assistance to you.

Sincerely,

Robert H. Bork

Robert H. Bork

cc: Honorable Dennis DeConcini
Honorable Strom Thurmond

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D C 20001

ROBERT H BORK
UNITED STATES CIRCUIT JUDGE

OCT 1 1987

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I submit this letter in order to supplement my testimony before the Committee concerning my participation in Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1983). I understand that the questions raised by the Committee concerning Vander Jagt arose from an August 24, 1987 letter to the Committee written by Senior District Judge James F. Gordon, a copy of which was provided me last week upon request.

I think the recollections of other persons involved, the contemporary documentation, and the practicalities of the situation all demonstrate that Judge Gordon's present recollection is incorrect. Moreover, I and other judges often discover in the course of preparing an opinion that "it will not write" and change the rationale or even the result. That is precisely what happened in Vander Jagt.

It may help to recount the events in Vander Jagt, as I and others remember them, because our recollection of these events differs significantly from Judge Gordon's. I have attached to this letter all the documents I have located in my files that concern the panel's deliberations in this case, and to which I will refer. As you can see from a review of these documents, I do not believe there is any basis for calling into question my actions in the Vander Jagt case. In addition, my recollection of these events is corroborated by my two law clerks who handled the case from beginning to end, Paul Larkin and John Harrison, and by Judge Robb's personal secretary, Ruth Luff. Ms. Luff's recall of these events was brought to my attention by Senior Judge MacKinnon, who called me after Judge Gordon's letter had been noted in the Washington Post. I have attached to this letter the declarations of Paul Larkin and John Harrison and the affidavit of Ruth Luff.

In Vander Jagt, several Republican Members of the House of Representatives filed suit alleging that House committee assignments by the Democratic majority impermissibly diluted the political influence of the Members and their constituents by assigning fewer seats on committees than their numbers would entitle them to proportionately. The district court dismissed the suit on the grounds that the challenge was precluded by the Speech or Debate Clause and the political question doctrine.

On March 19, 1982, I sat on a panel with Circuit Judge Robb and District Judge Gordon, of the Western District of Kentucky, sitting by designation, and heard oral argument on the appeal. At conference following the argument, the panel agreed to affirm the district court, and Judge Robb, who was senior judge on the panel, assigned the writing of the opinion to me. Judge Robb's March 19 memo stated "[t]he opinion will assume that the plaintiffs have standing, but will conclude that they are out of court for numerous other reasons."

In the course of preparing the opinion, I came to the conclusion that the appeal should be decided instead on the ground that the plaintiffs lack standing to sue. I reached this view after a review of the Supreme Court's decision in the Valley Forge case, handed down just months before. Soon thereafter I visited Judge Robb in his chambers and discussed with him my view that the rationale for our decision to affirm the district court should change. Judge Robb agreed with this proposed change, and I returned to my chambers and informed my law clerk assigned to the case, Paul Larkin, of the substance of my discussion with Judge Robb. Both Paul Larkin and Judge Robb's secretary, Ruth Luff, remember this meeting.

On September 17, I sent to Judge Robb and Judge Gordon a draft opinion in the Vander Jagt case; my cover memorandum routinely indicated that I was disseminating the draft "for your review and comment."

(Judge Gordon incorrectly remembers that my draft was not sent to him until "the first part of November," and incorrectly adds that it came without a cover note. This is important, because Judge Robb was hospitalized in November, as Judge Gordon's letter indicates, but he was not hospitalized before then, when these events took place, at the time when Judge Gordon would have had reason to call Judge Robb. As the declaration of John Harrison suggests, what Judge Gordon now remembers as a conversation with another judge concerning this incident may well have concerned other aspects of the case, including perhaps whether Judge Robb would write a separate opinion or join in Judge Gordon's opinion.)

My draft opinion proposed to affirm the district court's dismissal for lack of standing, consistent with my discussion with Judge Robb. One week later I wrote Judge Gordon, apologized for failing expressly to notify him in advance of the change in rationale, and explained my standing rationale; I sent a copy of this letter to Judge Robb on October 1, who may not have received it immediately because he was on vacation in Massachusetts at the time. I do not recall who or what prompted the September 24 letter to Judge Gordon.

To my great surprise, I received from Judge Robb in Falmouth, Massachusetts a memorandum to Judge Gordon and me dated October 5, in which Judge Robb expressed surprise at my draft opinion and disagreed with its rationale. Judge Robb wrote that he would apply the holding in the Riegle case, where the court determined a matter of its "equitable discretion" not to disturb the legislative decision. Judge Robb wrote "If Judge Gordon adheres to our reasoning and decision at conference, I suggest that he prepare an opinion along those lines. Judge Bork may of course write separately."

Although in his letter Judge Gordon states that at conference, the Riegle case and the equitable discretion doctrine were discussed, Judge Robb's memorandum the same day of argument does not mention that rationale as a basis for our decision. Moreover, I do not recall any mention of the Riegle rationale by Judge Robb or Judge Gordon at conference or at any time before Judge Robb's October 5 memorandum. My recollection that the Riegle rationale was not considered until Judge Robb's October 5 memorandum is supported by the two memoranda of Judge Robb in my files and my October 8 memorandum, discussed below, to which neither Judge Robb nor Judge Gordon objected. That memorandum shows that at our conference after the argument we agreed to put the case on either the Speech or Debate Clause or the political question doctrine.

I immediately wrote Judge Robb and Judge Gordon on October 8. I explained in full my standing rationale and recounted my earlier visit to Judge Robb's chambers, our discussion of the standing rationale, and Judge Robb's agreement with my proposed change in rationale. I readily acknowledged that "the confusion into which this case has been plunged" was the result of my failure immediately to apprise Judge Gordon of my discussion with Judge Robb when I disseminated my initial draft opinion September 17. I made no excuses; in fact the memorandum contains four separate apologies for this one oversight. I wrote, "Inexcusably, I neglected to write to Judge Gordon about my changed thinking. Judge Robb does not remember my conversation with him, does not doubt it took place, but is sure he must have misunderstood what I proposed." I informed the panel members that I would write a lengthier concurrence, one which would allow me fully to elaborate my thinking on the standing doctrine.

Thereafter, draft opinions by Judge Gordon and me were freely exchanged and comments were made on each other's drafts. I do not recall receiving any criticism from either Judge Robb or Judge Gordon at the time for changing my view of the case or even for failing to inform Judge Gordon right away of this change. Indeed, neither I nor my law clerk at the time, John Harrison, recalls that the matter was ever brought up after my October 8 memorandum.

In my view, whatever misunderstanding there had been in the early fall of 1982 as a result of my failure to inform Judge Gordon of my change in rationale when I sent him my proposed draft was long ago cleared up to everyone's satisfaction. Upon reading the affidavit of Judge Robb's secretary, I now understand why Judge Gordon could have been upset at the time, because Judge Robb, forgetting our visit, may have told Judge Gordon that he could not have agreed to a change in rationale because I never discussed the matter with him. But I do believe that my memoranda of September 24 and October 8, coming just days after I sent out my draft opinion, fully explained the circumstances to Judge Gordon, and I had no reason to doubt-- in fact, I gave the matter no thought-- that he was satisfied by my explanation until his letter to the Committee nearly five years later.

Judge Gordon's present day recollection of the events in 1982 is all the more surprising after his final letter to me is considered. On December 17, 1982, Judge Gordon sent me his "final draft," and asked that I see to it that his opinion would be processed for publication. Judge Gordon concluded his letter to me with the following: "May I take this opportunity of expressing to you my pleasure in sitting with you last March and the making of your acquaintance, and I wish for you and yours a happy and joyous Yuletide season." This is hardly the sentiment of one who thinks an attempt to dupe him has just been made.

The appeal was decided eventually on February 4, 1983. Judge Robb joined in Judge Gordon's opinion, which affirmed the district court's dismissal on the "equitable discretion" rationale announced in the Riegle case. I wrote a concurring opinion concluding that the plaintiffs lacked standing to sue.

In his letter to the Committee, Judge Gordon states that he was "shocked" to receive my draft opinion. Yet I do not recall that Judge Gordon expressed to me, either at the time, 1982-1983, or at any time since, any displeasure with the panel's deliberative process, or specifically, my involvement in the case. And Judge Gordon does not indicate in his letter that he ever raised this matter with me directly, at the time or at any time since. Indeed, the tone of his December 17, 1982 letter to me is utterly at odds with Judge Gordon's August 24, 1987 letter to the Committee.

After reading for the first time Judge Gordon's letter to the Committee, I can understand why some members of the Committe raised questions. But I cannot help but conclude that, had Judge Gordon consulted the several documents that were sent to him by me and Judge Robb at the time, which I have attached to this letter, he would not have written the August 24 letter to the Committee.

Apart from this detailed account of my recollection of the panel's deliberations in Vander Jagt, I am compelled to respond to Judge Gordon's accusation that I somehow intended to have my view on standing serve as the holding of the case and become the law of the circuit, without obtaining knowing concurrence of at least one other judge. As I indicated during my testimony, it is simply preposterous to suggest that I could or would have attempted any such thing. The record that is at my disposal, and which I submit to the Committee, in my view refutes any such idea. In particular, the discussion I had with Judge Robb, and the explanatory memoranda I wrote to Judge Robb and Judge Gordon belie this notion.

Of course, the very fact of sending a draft opinion to the other members of the panel, "for their review and comment," as I did in this case, is all that is often done on my court, and frankly, it is all that is or should be necessary. Not infrequently, I have received from other judges on my court draft opinions incorporating changes in rationale from that to which the panel had agreed at conference, and sometimes even a change in the result, without any separate explanation. And every opinion of the D.C. Circuit must circulate among all members of the court for a period of time before it may be issued. There is simply no possibility that any judge could change the law of the circuit surreptitiously. Even if that were possible, as it is not, the full court would simply grant the inevitable petition for rehearing en banc and put the law back in its prior position. Any judge who tried such a maneuver would certainly fail and would, moreover, forfeit forever the respect of his or her colleagues. The facts show that I attempted no such thing.

I hope this letter responds to any questions the Committee has concerning Judge Gordon's letter about the Vander Jagt case.

Sincerely,

Robert H. Bork

Robert H. Bork

Attachments

cc: Honorable Strom Thurmond

March 19, 1982

MEMORANDUM to Judge Bork
Judge Gordon

RE: Vander Jagt v. O'Neill
No. 81-2150

FROM: Judge Robb

At conference we agreed to affirm the District Court. Judge Bork offered to prepare the opinion. The opinion will assume that the plaintiffs have standing but will conclude that they are out of court for numerous other reasons.

R.R.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

ROBERT H. BORK
UNITED STATES CIRCUIT JUDGE

MEMORANDUM

TO: Judge Robb
Judge Gordon

FROM: Judge Bork

RE: No. 81-2150 -- Guy Vander Jagt, et al. v. Thomas O'Neill, Jr.

DATE: September 17, 1982

Attached is my proposed opinion in the above-mentioned case for your review and comment.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON D C 20001

ROBERT H BORK
UNITED STATES CIRCUIT JUDGE

September 24, 1982

The Honorable James F. Gordon
United States District Court
Western District of Kentucky
P.O. Box 435
Federal Building
Owensboro, Kentucky 42301

Re: No. 81-2150 -- Guy Vander Jagt, et al. v. Thomas O'Neill, Jr.

Dear Judge Gordon:

It occurs to me too late that I should have notified you in advance that I had changed the rationale in the Vander Jagt case to one of lack of standing.

After I got started on the opinion, it became apparent that it was harder to dispose of the case under either the political question doctrine or the Speech or Debate Clause. The Supreme Court's opinion in Valley Forge, on the other hand, made it relatively easy to dispose of the case on the standing ground. This tack was also indicated because there are some en banc rehearings coming up in this circuit for which the other two grounds might have implications. That would have complicated the writing of the opinion based upon political question or Speech or Debate.

In any event, I regret not having apprised you of my thinking earlier in the process of writing.

Best wishes.

Sincerely,

Robert H. Bork

Robert H. Bork

RHB/hh

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D C 20001

ROBERT H BORK
UNITED STATES CIRCUIT JUDGE

MEMORANDUM

TO: Judge Robb

FROM: Judge Bork

RE: No. 81-2150 -- Guy Vander Jagt, et al. v. Thomas O'Neill, Jr.

DATE: October 1, 1982

Attached is the letter I sent to Judge Gordon.

Falmouth, Mass.
October 5, 1982

MEMORANDUM to Judge Bork
Judge Gordon

RE: Vander Jagt v. O'Neill
No. 81-2150

FROM: Judge Robb

My post-conference memorandum in this case said:

> At conference we agreed to affirm the District Court. Judge Bork offered to prepare the opinion. The opinion will assume that the plaintiffs have standing but will conclude that they are out of court for numerous other reasons.

Now I am surprised to have Judge Bork's proposed opinion, holding that the plaintiffs are out of court because they have no standing to sue. Although I agree with the result I regret that I cannot concur in the opinion. I would apply the _Riegle_ theory to this case. The _Valley_ _Forge_ case, relied on in the proposed opinion, was not a case of a congressional plaintiff, and I see nothing in it that suggests that the Court would not have approved the application of the _Riegle_ theory in a congressional plaintiff context.

I think it can be argued here that in many ways plaintiffs have suffered injury. Although the proposed opinion says their votes have not been nullified, it is certainly true that the power or weight of their votes has been substantially diminished. I am not prepared to say that a plaintiff has standing to sue if his injury requires major surgery, but he will not be heard if he has suffered only bruises and contusions.

If Judge Gordon adheres to our reasoning and decision at conference, I suggest that he prepare an opinion along those lines. Judge Bork may of course write separately.

R.R.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

ROBERT H. BORK
UNITED STATES CIRCUIT JUDGE

MEMORANDUM

TO: Judge Robb
Judge Gordon

FROM: Judge Bork RHB

RE: No. 81-2150 -- Guy Vander Jagt, et al. v. Thomas O'Neill, Jr.

DATE: October 8, 1982

Since my earlier failure to communicate is largely responsible for the confusion into which this case has been plunged, I think it advisable to set out my current thoughts about the case.

1. As explained in my prior memorandum, I think it easier to deal with this case on the standing doctrine than on the political question doctrine or the Speech or Debate Clause. That is true both for doctrinal reasons and because the latter two questions are much involved in a case we are to hear en banc later this month.

2. Having reached this conclusion in the course of preparing the opinion, I visited Judge Robb in his chambers and explained that I preferred to dispose of the case on standing grounds by returning to the complete-nullification-of-a-vote test adopted by the per curiam opinion in Goldwater v. Carter. I understood Judge Robb to agree to this strategy. Inexcusably, I neglected to write to Judge Gordon about my changed thinking. Judge Robb does not remember my conversation with him, does not doubt it took place, but is sure he must have misunderstood what I proposed.

3. Judge Robb suggests that Judge Gordon prepare an opinion affirming the district court on the basis of the circumscribed equitable discretion doctrine elaborated in Riegle. This is yet a fourth ground for affirmance and one not discussed at our conference. I do not object to it for that reason, however. Nor do I have any problem with the idea of turning my opinion into a concurrence.

4. I do not agree that the premise of Riegle can any longer be considered intact. The Supreme Court's Valley Forge decision unmistakably demonstrates that separation-of-powers concerns are to be implemented through the concept of standing. Valley Forge, which came after Riegle, is merely the latest in a long line of Supreme Court decisions which make that clear. I do not believe there is any significance in the fact that Valley Forge did not involve a congressional plaintiff. Indeed, separation-of-powers concerns are even stronger when the plaintiff is a congressman.

5. Assuming that Judge Gordon does prepare a majority opinion resting on the doctrine of circumscribed equitable discretion, I will feel free, as I did not when writing for the court, to express my views more fully. I think I should indicate now what those views are and how my concurring opinion is likely to differ from the present draft. I would, as mentioned above, point out that the decision in Valley Forge removes the foundation upon which Riegle rests. I would explain my reasons for thinking that the doctrine of circumscribed equitable discretion incorporates erroneous criteria and permits too many suits by legislators. I would, at a minimum, urge a return to the test of Goldwater v. Carter and would, probably, go on to suggest that Kennedy v. Sampson was wrongly decided and that there should be no such doctrine as legislator standing.

I mention these things now out of what may be an excess of caution bred of my failure to communicate fully earlier in the preparation of my opinion. In no sense do I wish to be understood as in any way displeased that one or both of you cannot agree with what I have written. I welcome the idea of writing a concurrence precisely because I will be able more freely to express what I think about this area of the law.

6. If there is any danger of mootness in this case, I do not think it could arise until January 3, 1983, when a new House of Representatives will come into existence. However, I do not think the case will become moot even then.

7. Despite my own failure in the past, I would appreciate learning as soon as Judge Gordon has decided whether the majority opinion is to rest on Riegle so that I can be ready with my concurrence and not delay the issuance of our decision.

I apologize to both of you for not making matters clearer as I went along.

United States District Court
FOR THE
Western District of Kentucky
Owensboro, Kentucky 42302

Chambers of
James F. Gordon
Judge

December 17, 1982

The Honorable Robert H. Bork
Judge, U. S. Court of Appeals
District of Columbia Circuit
3rd and Constitution Avenue, N.W.
Washington, D. C. 20001

RE: Vander Jagt v. Speaker O'Neill, No. 31-2150

Dear Judge Bork:

I have not as yet received your most recent rewrite in the above-styled matter; however, in the interest of time, I enclose herewith two copies of the final draft of my opinion.

The final draft attached hereto contains some changes on pages 3 and 8 of the opinion and on Footnote pages 9, 10, and 11, plus the further fact I have rewritten the same so that it becomes now only my opinion as opposed to mine and Judge Robb's opinion.

Inasmuch as you are now, in Judge Robb's absence, the presiding Judge, I assume that you will see to the proper processing of my opinion through the Clerk's office there, and that there is nothing further for me to do. I would however appreciate it if you would have your law clerk give us a ring here when you have received this.

May I take this opportunity of expressing to you my pleasure in sitting with you last March and the making of your acquaintance, and I wish for you and yours a happy and joyous Yuletide Season.

Sincerely,

James F. Gordon
JAMES F. GORDON

JFG/ddt

Attachment

DECLARATION OF
PAUL J. LARKIN, JR.

I, Paul J. Larkin, Jr., being duly sworn, state:

1. I served as a law clerk to the Honorable Robert H. Bork, Circuit Judge for the United States Court of Appeals for the District of Columbia, from February 12, 1987, through August 13, 1982.

2. The following account is my current recollection of the events concerning the Judge's participation in the Vander Jagt v. O'Neill case, which was heard by Judge Robb, Judge Bork, and Judge Gordon.

3. At the conference following the oral argument in the case, Judge Bork was given the assignment of drafting the opinion for the panel. Judgment was to be entered in favor of the defendants, O'Neill et al. I believe that the panel's tentative rationale was to be that the plaintiff's claim presented a nonjusticiable political question. I remember that the rationale was not to be that the plaintiffs lacked standing.

4. Judge Bork decided to draft the opinion himself, rather than ask me to prepare a draft. After working on the opinion, Judge Bork concluded that the panel should rule instead that the plaintiffs lacked standing to sue. I believe that Judge Bork

concluded after reading the Supreme Court's January 1982 decision in the Valley Forge case that standing was the appropriate basis for disposing of the Vander Jagt case. Judge Bork told me that he would speak with Judge Robb about his new proposed rationale.

5. Judge Bork spoke with Judge Robb in Judge Robb's chambers about the standing rationale. Judge Bork spoke with me after he returned to chambers. Judge Bork told me that Judge Robb had agreed to dispose of the case on a standing basis, rather than on the rationale to which the panel had originally agreed.

6. I finished my clerkship in late summer. I was surprised when I received a copy of the opinion in the case, because Judge Bork's proposed opinion had become a separate concurrence, rather than the opinion for the court.

7. In my view, there is no foundation to the accusation that Judge Bork's conduct in this case was improper. I find it impossible to believe, and know of no evidence to support the claim, that he sought to take advantage of Judge Robb's illness and to "pull a fast one" on the other members of the panel or on the District of Columbia Circuit.

Paul J. Larkin, Jr.

Subscribed and sworn to me this 25th day of September, 1987.

District of Columbia

Carol L Miles

Notary Public Carol L. Miles

My Commission Expires August 14, 1989

DECLARATION OF JOHN HARRISON

1. I was a law clerk to Judge Robert Bork, U.S. Circuit Judge for the District of Columbia Circuit, from August of 1982 to August of 1983. During that period I was the clerk primarily responsible for the case of Vander Jagt v. O'Neill, a responsibility I took over from Paul Larkin.

2. My recollection of the events concerning Vander Jagt and their order is not perfect, but I do recall what happened with the case and have several specific recollections.

3. As Judge Bork's files reflect, he circulated his draft panel opinion in the case on September 17, 1982. The cover memo did not mention that the rationale was standing rather than political question or the Speech or Debate Clause. A week later, Judge Bork wrote a letter to Judge Gordon in which he explained the change of rationale and apologized for not having discussed the matter with Judge Gordon earlier. Although I do not remember the specific dates, I do remember circulating the first draft of Vander Jagt and I do remember Judge Bork writing the letter to Judge Gordon.

4. I also remember Judge Bork remarking on (1) his conversation with Judge Robb in which they discussed the new rationale and (2) the fact that Judge Robb later did not remember the conversation. Judge Bork said that another of the judges on the court had spoken of a similar problem with Judge Robb. I think that Judge Bork talked about this after receiving Judge Robb's memo of October 5, but I am not certain.

5. After he decided not to go along with the standing argument, Judge Robb asked Judge Gordon to write an opinion for the two of them based on equitable discretion. That ground of decision is not mentioned in Judge Robb's conference memo of March 19, as Judge Bork noted in his memo of October 8.

6. I specifically remember Judge Bork drafting the October 8 memo. In particular, I recall his expression of regret about the confusion into which the case had been thrown as a result of his failure properly to communicate with Judge Gordon. Judge Bork seemed quite upset with himself for not having called Judge Gordon at the time he talked to Judge Robb about the change in rationale.

7. Our chambers exchanged drafts with Judge Gordon's so that we could comment on one another's work. I discussed the case at some length with Judge Gordon's clerk and do not remember the change of rationale as a source of any friction between the clerks.

8. On at least one occasion, Judge Robb's wishes in the case were communicated to Judge Bork through Judge Wilkey. My recollection is that Judge Wilkey told Judge Bork that Judge Robb had decided to join Judge Gordon's opinion; earlier, Judge Robb had planned to issue a short statement of his own saying simply that he thought the case should be disposed of under the equitable discretion doctrine.

9. Based on my experience as a law clerk on the D.C. Circuit, the implication that Judge Bork hoped somehow to mislead the other members of the panel by changing his ground of decision without telling them is implausible. A judge could hope to do this only if he believed that no one else would read his draft.

John H

John Harrison

Subscribed and sworn to me this 28th day of September, 1987.

STATE OF: District of Columbia

Carol L Miles

My Commission Expires August 14, 1989

Carol L. Miles/Notary Public

AFFIDAVIT OF RUTH LUFF

I, Ruth Luff, being duly sworn on oath, state:

1. I served as personal secretary to Judge Roger Robb, Circuit Judge on the U.S. Court of Appeals for the District of Columbia, from his appointment in 1969 to June 1983 after Judge Robb assumed senior status.

2. The following account is my recollection of the events concerning Judge Robb's involvement in Vander Jagt v. O'Neill, a case heard by Judge Robb, Judge Bork and Judge Gordon in March 1982 and decided by the court of appeals in February 1983 in an opinion by Judge Gordon joined in by Judge Robb.

3. I was contacted several days ago by Tony Fisher, the Clerk of the U.S. Court of Appeals for the District of Columbia, who had been approached by someone from the Senate Judiciary Committee. I was told that the Committee wished to interview me. A staff person from the Committee called me later but did not mention the Vander Jagt case. He asked me about certain people and I told him I no longer maintained close contact with anyone from the court, and probably could not answer any of his questions. I mentioned that I was busy with a new career. At that point he thanked me and the conversation ended.

4. After I read the article in the Washington Post, concerning Judge Gordon and the Vander Jagt case, my memory was refreshed and I recalled the case and many of the circumstances surrounding it.

5. I recall specifically that Judge Bork visited Judge Robb in his chambers on this case after the case was heard, because Judge Robb asked me to locate the file on the case and give it to him. Although I cannot remember precisely when this meeting took place, I believe it was in the spring of 1982.

6. I remember that at one point later, perhaps in October 1982, Judge Gordon called Judge Robb, and I got the impression that Judge Gordon was upset by something Judge Bork had written. After Judge Robb ended his conversation with Judge Gordon, he made a critical remark about Judge Bork to me, and said something to the effect of "He never came to see me, and he never let Judge Gordon know." Judge Robb apparently did not recall his meeting with Judge Bork and apparently had told Judge Gordon that. Although I knew that Judge Bork had seen Judge Robb on this case, I did not mention it at the time. I remember Judge Bork's visit to Judge Robb on this case because of the controversy that ensued after this telephone call.

7. It is not surprising that Judge Robb did not recall his meeting with Judge Bork, because Judge Robb was going through a difficult period at this time and shortly thereafter went into the hospital.

8. I do not understand all the attention this case has received. The exchange of draft opinions between judges, sometimes incorporating different rationales than that to which the panel members had initially agreed at conference, is common practice. I do not recall any hard feelings among judges in the past in any case in which this practice occurred.

9. I am making this statement because I believe that, based on my memory of the events, the accusations of improper conduct by Judge Bork are unfounded and unfair, and the questions about Judge Bork's integrity caused by this matter deserve to be put to rest.

Ruth Luff

District of Columbia

Subscribed and sworn to me this 25th day of September, 1987.

Notary Public Carol L. Miles

My Commission Expires August 14, 1989

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D.C. 20001

ROBERT H. BORK
UNITED STATES CIRCUIT JUDGE

October 1, 1987

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senator
Washington, D.C. 20510

Dear Senator Biden:

This letter responds to Senator Weicker's letter of September 11, 1987, asking for my views on the religion clauses of the United States Constitution. Specifically, he asked me to comment upon the interaction between the establishment clause and the free exercise clause; upon the Lemon test set forth in Lemon v. Kurtzman; and upon the Supreme Court's recent decision in Wallace v. Jaffree.

In the course of my testimony before the Senate Committee on the Judiciary, and in the other discussions I have had with members of the Senate, I have described my general approach to analyzing legal problems and deciding cases. I have also elaborated upon the reasoning in the articles, speeches, and judicial decisions which I have written. I have refrained from commenting specifically on other matters which might come before me on the United States Court of Appeals, or, if I am confirmed, on the United States Supreme Court.

In Wallace v. Jaffree, the Supreme Court held unconstitutional an Alabama statute authorizing a "moment of silence" in the public schools. This issue is one upon which I have never commented, and it is a recurring one before the Supreme Court. Indeed, I understand that the question of the constitutionality of a somewhat similar statute will soon be before the Court in the case of Karcher v. May. For these reasons, I do not believe it would be appropriate for me to discuss Wallace v. Jaffree.

I am able to discuss the other matters raised by Senator Weicker's letter.

Under the Lemon inquiry, a practice or statute will be held not to violate the Establishment Clause if it (1) has a secular legislative purpose, (2) does not have the principal or primary effect of advancing or inhibiting religion, and (3) does not foster excessive entanglement between government and religion. This has not been regarded as an absolutely rigid test, and the Court has on occasion ignored or downplayed it. For example, the hiring of legislative chaplains would appear to run afoul of the Establishment Clause under the Lemon analysis, but the Court upheld the practice in Marsh v. Chambers on the independent basis of long-standing historical tradition. This is why the Court itself will sometimes describe the Lemon inquiry as a "test," but on other occasions explain that it is "no more than [a] useful signpost[]" (Mueller v. Allen) or a "guideline" (Committee for Public Education v. Nyquist).

In my judgment, there exists some tension between the current interpretations of the Establishment Clause and the Free Exercise Clause. This arises from the fact that the actions which are held to be required under the Free Exercise Clause in many instances would have been held to violate the Establishment Clause had they been taken absent a court order. For example, the Supreme Court in Wisconsin v. Yoder held that the Amish had a free exercise right to be released from school earlier than others. Yet if the State of Wisconsin had passed a statute according the Amish this privilege, that statute would have been very difficult to sustain under the Lemon test, since it would seem both to lack a secular purpose and to have the principal effect of advancing religion -- indeed, one particular religion.

This point was made by Professor Jesse Choper in his 1980 article entitled "The Religion Clauses of the First Amendment: Reconciling the Conflict." He wrote:

> Thus, the seemingly irreconcilable conflict: on the one hand the Court has said that the Establishment Clause forbids government action whose purpose is to aid religion, but on the other hand the Court has held that the Free Exercise Clause may require government to accommodate religion. Unfortunately, the Court's separate tests for the Religion Clauses have provided virtually no guidance for determining when an accommodation for religion, seemingly required under the Free Exercise Clause, constitutes impermissible aid to religion under the Establishment Clause. Nor has the Court adequately explained why aid to religion, seemingly violative of the Establishment Clause, is not actually required by the Free Exercise Clause.

For this reason, among others, I have expressed the view that too rigid an application of the Lemon test could be unwise in an area as fraught with subtleties as this one. If applied rigorously, the Lemon test might disallow the granting of religious exemptions to the draft, or the engraving of "In God we Trust" on our coins. Perhaps it is in recognition of this that the Court has declined to apply the Lemon test with equal force in every decision.

You may wish to know that I am hardly alone in my observations about the Supreme Court's three-part establishment clause test. In addition to Professor Choper, Professor Philip Kurland of the University of Chicago, in his 1979 article, "The

Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court," has said that the Supreme Court's three-part test has caused "much confusion and conflict." According to Professor Kurland, the three-prong test "hardly elucidates the Court's judgments. Nor does it cover the plastic nature of the judgments in this area. Judicial discretion, rather than constitutional mandate, controls the results."

Consequently, it may be that no one simple "test" can capture the complexities of these issues in every case. As I commented in a speech at the Brookings Institution in 1985: "The subject at hand...ought to be approached with flexibility and caution. In particular, we ought to be chary of formulating clear rules for every conceivable interaction of religion and government." What we need to ask in each case is whether a challenged practice is consistent with the core values of religious freedom and toleration which underlie the first amendment.

Finally, I would like to reiterate what I said before the Judiciary Committee: "I am convinced that the principle of nonestablishment is essential to our society, and I know the framers thought so, particularly with the memory of the religious wars in Europe in mind, and I think the principle of free exercise is also vitally important."

Sincerely,

Robert H. Bork

Robert H. Bork

cc: Honorable Lowell Weicker
Honorable Strom Thurmond

LOWELL P. WEICKER, JR.
CONNECTICUT
PHONE 202-224-4041

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September 22, 1987

The Honorable Robert H. Bork
United States Circuit Judge
United States Court of Appeals
District of Columbia Circuit
Washington, D.C. 20001

Dear Judge Bork:

Thank you for your letter of September 11, 1987 and the attached letters to the Washington Post from Rabbi Haberman and Mr. Citkin.

In furtherance of our previous discussion, I would like to solicit your comments on the Lemmon test in establishment clause cases. Specifically I would like to know whether you endorse this test and if you do not endorse the Lemmon test, I would like to know what approach you would take in deciding cases under the establishment clause. I am also quite interested in your views on the interaction between the establishment clause and the free exercise clause.

Although I am aware that you cannot tell me how you would decide the case, I would like you to discuss, to the extent possible, your views on the case of Wallace v. Jaffree. Do you think that the court approached the case correctly? What other factors would you have taken into account in deciding the case? Also, please comment on Justice Powell's concurring opinion.

I am looking forward to receiving your reply.

Sincerely,

Lowell Weicker, Jr.
United States Senator

LW/dcs

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D C 20001

ROBERT H BORK
UNITED STATES CIRCUIT JUDGE

OCT 2 1987

Honorable Joseph R. Biden
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I submit this letter in answer to a letter from Senator Patrick Leahy dated September 23, 1987.

Senator Leahy asked for my comments on a 1974 article by the Los Angeles Times suggesting that Chief Justice Burger and I met on the issue of timely filings. I cannot recall a meeting such as the Times described taking place between the Chief Justice and me. We did, however, discuss two years later changing the procedure under which the Solicitor General's Office filed a response to every certiorari petition in criminal cases. I proposed that my Office file a response only in those cases where it would be of material assistance to the Court. A copy of a letter that I sent to the Chief Justice formalizing my suggestion is attached.

I believe the record should reflect that the Court accepted my proposal. It has remained in place for some fourteen years, and I understand that the Solicitor General's Office currently waives response in approximately fifty percent of the relevant petitions. The Office has long had a reputation as a small, collegial operation. In my view, it is unlikely that the Office could have maintained that atmosphere without this solution to the workload problem.

During my tenure as Solicitor General, I made every effort possible towards timely filing in the Supreme Court. In spite of those efforts, some papers were not filed within the Court's deadlines. As my letter to Chief Justice Burger explained, much of the delay was attributable to the fact that government litigation often requires the assistance and concurrence of many components inside the Department of Justice not to mention various other agencies. Moreover, occasional tardiness was not a problem confined to my term in office, as briefs were filed late during the tenure of some of my successors. This is in no way a criticism of those particular Solicitors General, but merely a demonstration that the problem of timely filing, given the volume of cases and the personnel available, proved as intractable for others as it did for me.

If I can provide any further information, please do not hesitate to call.

Sincerely,

Robert H. Bork

Robert H. Bork

Attachment

cc: Honorable Patrick Leahy
Honorable Strom Thurmond

Office of the Solicitor General
Washington, D.C. 20530

September 24, 1976

The Chief Justice of the United States
The Supreme Court of the United States
Washington, D.C. 20543

Dear Mr. Chief Justice:

Pursuant to our recent conversation, I am writing this letter to supply you with some background information on the filing of responses by the United States to certiorari petitions in criminal cases and to propose some changes in our procedures that I believe will be mutually beneficial. Since I am reluctant to institute any changes that the Court would find undesirable or burdensome, I would appreciate it if you could advise me if the Court would object to the proposal set forth below.

As you may know, our present policy, which has been in effect since before I became Solicitor General, is to attempt to file responses to certiorari petitions in every case in which the United States or an agency, officer or employee thereof is a respondent. Because of the rapidly escalating volume of such petitions in recent years, as well as of other facets of the Court's business with which we are concerned, it has become increasingly difficult for us to produce timely filings of briefs in opposition, as well as to maintain a high level of quality in these filings. This matter has unquestionably been the most burdensome and seemingly intractable administrative problem of my tenure as Solicitor General, with consequences that affect our ability to serve the Court well in its difficult task of selecting cases for plenary review and that also, understandably, generate a certain amount of resentment toward the government on the part of the private bar, which can hardly be cognizant of all the reasons why the government has difficulty filing timely responses in every case.

The volume of Supreme Court cases to which the United States is a party, and especially of criminal cases, has been increasing at a considerably faster rate than the Court's overall docket. To illustrate, the total number of cases docketed in the Court during the 1975 Term was up about 15% from the 1970 Term (from 3420 to 3939), yet the in forma pauperis cases in which we were respondent (the vast preponderance of which are criminal cases) increased 51% during the same period (from 649 to 983). Overall, the United States' participation in cases acted upon by the Court rose from 38% of all cases in the 1970 Term to 47% of all cases in the 1975 Term. And these statistics do not tell the whole story. The problem is exacerbated by the fact that certiorari petitions in criminal cases have come in recent years to raise more issues, which substantially increases the amount of time required to prepare the response in each case.

While we have increased the number of attorneys in the Solicitor General's Office in order to enable us to cope with the increasing volume and complexity of Supreme Court litigation in which the United States is involved, we nevertheless remain dependent for vital assistance upon other parts of the Justice Department, which unfortunately have not been able to increase their capacity to assist in Supreme Court litigation at the same rate. This problem is particularly acute in the Criminal Division, upon which the brunt of the enlarged caseload has fallen. As you know, the Appellate Section of the Criminal Division is assigned the function of preparing draft briefs or memoranda in response to practically all petitions in federal criminal cases, as well as in federal prison and parole litigation and immigration cases. Because of budgetary limitations, the staffing of the Appellate Section, both professional and secretarial, has not increased recently (in fact, it has declined somewhat in the last 12 to 18 months), and it is unable in a substantial number of cases to provide us with timely draft responses to certiorari petitions. For example, as of September 14, 1976, there were 57 criminal cases in which our responses were overdue in Court but in which the Criminal Division, for the reason stated above, had not provided us with a draft response, and there were 88 other cases in which the Criminal Division had failed to meet our internal deadlines for transmitting drafts to my office. I have discussed the situation with the Criminal Division repeatedly, and they have convinced me that with the present staff size in the Appellate Section, they cannot supply us with drafts on time.

As a result, I have concluded that we should -- temporarily, at least -- discontinue our efforts to file responses to every certiorari petition filed against the government in a criminal case. I have given considerable thought to the alternatives and have developed a proposal that I believe to be worth implementing on a trial basis, for a period of six months or so. Under this proposal, I would assign several lawyers from my office and from the Appellate Section of the Criminal Division the task of reviewing all petitions in criminal cases (including prison and parole litigation) as they are filed, with an eye to determining in which cases a response by the United States would be likely to be of material assistance to the Court in acting upon the petition. On the basis of this screening, it should prove possible to identify a significant number of petitions (perhaps one-third to one-half) that do not require a response. We would of course continue to respond in any case that appears to present a complex or potentially significant issue, or where the factual background is confused or difficult to follow from a reading of the petition or the opinion of the court of appeals.

Having done this initial screening, we would then send a letter to the Clerk of the Court, perhaps on a weekly basis, listing every case reviewed and indicating whether we plan to file a response. Naturally, in any case in which we planned to file no response, we would still prepare a response if requested to do so by the Court. We would report our intentions to the Clerk in every case within two weeks of the time the petition is served on us.

By means of this approach, we should be able to reduce significantly the number of cases in which we file responses. If this approach works as I hope, the cases eliminated would be ones in which a response by us is not particularly helpful or needed by the Court in acting on the petition -- i.e., cases in which the issues presented are plainly unsuitable for review by the Court or in which there is no need to add anything to the opinions of the lower courts. The time saved by this approach could be devoted -- more profitably, I believe -- to briefs on the merits and to more careful consideration of the cases in which a response to the certiorari petition is deemed needed.

This approach offers other possible benefits. For instance, under present practice as I understand it, the Clerk distributes the petition to the Court about 50 days after it has been filed (roughly the time provided by Rule 24(1) for the filing of the government's response). Under my proposal, he would be able to distribute those cases in which we indicate we do not intend to respond five or six weeks earlier than he now does. In most instances, the Court will be able to act upon the petitions in this group of cases considerably faster than is now possible. And, of course, if the Court disagrees with our judgment that no response is necessary in any given case, it can call for a response, which we would strive to supply expeditiously.

As I mentioned when we spoke of this the other day, we are also pursuing other avenues of possible relief, principally an effort to secure a significant number of additional lawyers and staff for the Appellate Section of the Criminal Division. This request is in the process of preparation for transmission to the Office of Management and Budget. It is difficult for me to predict whether the request has a substantial prospect for success; but even if the additional positions are authorized in the relatively near future, it will take time to hire and train the added personnel, so that immediate relief from the present predicament is impossible.

I appreciate your interest and understanding in connection with this matter, and I look forward to learning of the Court's views regarding my proposal.

Sincerely,

Robert H. Bork

Robert H. Bork
Solicitor General

United States Senate

September 23, 1987

Honorable Robert H. Bork
U. S. Court of Appeals for the
District of Columbia Circuit
U. S. Courthouse, Room 3128
3rd Street and Constitution Avenue, NW
Washington, DC 20001

Dear Judge Bork:

Enclosed please find a copy of a letter I have sent to former Chief Justice Burger, soliciting his comments on an article that appeared in the November 10, 1974 edition of the Los Angeles Times. A copy of that article is also enclosed.

I believe that your recollections about the alleged incident described in this article, and any other comments you may wish to make about the surrounding facts and circumstances, would be useful to the Judiciary Committee as it considers your nomination to the Supreme Court. Accordingly, I invite you to submit for the record any written statement on this subject that you feel appropriate.

Sincerely,

Patrick Leahy

PATRICK LEAHY
United States Senator

JOSEPH R. BIDEN, JR., DELAWARE, CHAIRMAN
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HOWELL HEFLIN, ALABAMA	GORDON J. HUMPHREY, NEW HAMPSHIRE
PAUL SIMON, ILLINOIS

[illegible]

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

September 23, 1987

Honorable Warren E. Burger
Supreme Court of the United States
1 First Street NE
Washington, DC 20543

Dear Mr. Chief Justice:

As I mentioned when you appeared before the Judiciary Committee this morning on the nomination of Judge Bork, there is one additional question to which I would appreciate your response.

The Los Angeles Times reported on November 10, 1974, under the headline "Court Complains of Tardiness by Solicitor General," that you "summoned [Solicitor General] Bork to [your] chambers and complained for more than an hour about the solicitor general's chronic tardiness in filing briefs and memoranda" in cases pending before the Supreme Court. I enclose a copy of the article for your review.

As you have frequently noted, the Supreme Court is called upon to handle an extraordinary workload. The allegation contained in this article certainly appears relevant to the nominee's capacity to manage efficiently the business of the Supreme Court.

The article states that you declined to discuss the subject matter of your meeting with the Solicitor General. Because you may still find it inappropriate to discuss this matter in a public forum, I decided not to ask you about it during this morning's hearing.

However, because this allegation has been repeated in some recent newspaper and magazine articles about Judge Bork's nomination, I believe it would be helpful to the Committee to have your recollection as to whether the incident described by the Los Angeles Times occurred. If it did, I would welcome any further comments you may have about the facts and circumstances surrounding this incident.

I am sending a copy of this letter to Judge Bork, along with an invitation for him to submit any written comments that he thinks would be helpful to the Committee in evaluating the news article I have enclosed.

If I may reiterate one of my comments to you this morning, I believe that it was quite beneficial to the Senate's performance of its constitutional functions to have your thoughtful testimony on this nomination. I look forward to your response to this letter.

Sincerely,

Patrick Leahy

PATRICK LEAHY
United States Senator

cc: Honorable Robert H. Bork

[From the Los Angeles Times, Nov. 10, 1974]

COURT COMPLAINS OF TARDINESS BY SOLICITOR GENERAL

BORK CALLED IN BY BURGER; SOME GOVERNMENT BRIEFS FILED UP TO 4 MONTHS LATE

(By Linda Mathews)

WASHINGTON.—The federal government and Solicitor General Robert H. Bork, its advocate before the Supreme Court, are in trouble with Chief Justice Warren E. Burger, for slowing down the high court's work.

In an extraordinary move, Burger recently summoned Bork to his chambers and complained for more than an hour about the solicitor general's chronic tardiness in filing briefs and memoranda with the justices. Some filings have been as much as four months late.

Bork refused to discuss the meeting. Burger, through a court spokesman, would say only that he meets with the solicitor general on routine matters * * * and saw no reason to disclose the subjects they discussed.

But two well-placed sources confirmed that the session was specifically to discuss the lateness problem. They said that Burger, although critical, expressed sympathy for Bork because, like the court itself, the solicitor general's office carries a heavy work load. Bork promised to be more prompt.

Burger apparently called the meeting at the suggestion of several justices who were startled and concerned about the continual deliquency of the Justice Department in the year that Bork, a former Yale law professor has served as solicitor general.

At least one justice, William O. Douglas, reportedly believes that Bork's lateness not only interferes with the justices' work but deprives opposing parties of their rights to speedy disposition of their cases.

The reason the justices were surprised by Bork's inability to meet deadlines was that past solicitors general have earned a reputation unequaled by the private lawyers who practice before the court for reliability.

"Griswold was never late," said one court source, referring to Bork's immediate predecessor, Erwin Griswold. "We couldn't quite believe it when Bork started missing deadlines and we got hit with complaint after complaint from lawyers on the other side."

At one point, the court heard and disposed of nearly 100 cases without ever hearing from Bork. The memoranda were piled up on the desk of a Bork deputy.

The court official who schedules oral arguments has grown accustomed to juggling and rejuggling his schedules because government cases were not ready to be argued. He discovered that the only way to prod Bork's office into action was to refuse extensions.

In an interview, Bork admitted that his office had a "disastrous summer" but said, that members of his staff were slowly catching up and would soon be abreast of their work.

"The problem essentially is the case load," he explained. "In the 1963 term, the solicitor general's office was involved in 910 cases, about 36% of the Supreme Court's docket. In 1973, we handled 2,248 cases which is about 48% of the docket. The court's case load increases evey year, but ours is increasing even faster."

His office has not grown, Bork said, to keep pace with the expanding docket. Two lawyers were added last year, bringing the total to 16, plus Bork. This small staff approves almost all government appeals to the Supreme Court, rewrites draft petitions and briefs submitted by other agencies and divisions of the Justice Department and handles almost all of the government's oral arguments before the court.

Other sources familiar with Bork's office say that, although the growing case load accounts for some tardiness, Bork also should be held personally responsible. "He's a fine scholar and a very nice man, but a lousy administrator," one person said.

Bork was slow to acknowledge that his office was slipping behind and then, despite the rather cut-throat reputation he gained by firing special prosecutor Archibald Cox, too easy-going to correct the situation, another source said.

For nearly two months last fall, Bork was forced to ignore his duties as solicitor general while he served as acting attorney general. He inherited that office when Atty. Gen. Elliot L. Richardson and Dep. Atty. Gen. William D. Ruckelshaus resigned rather than discharge Cox.

Sources also blamed Jewel LaFontant, a Bork deputy, for some delay. They say that former President Richard M. Nixon appointed her to the high-ranking post because she was a black Republican, not because of her legal experience, and that she has not shouldered her share of the work. Bork vigorously denied this, saying, "Mrs. LaFontant does her work and should not be blamed for our problems."

Whatever the reason for government delays, they continue to irritate lawyers on the other side, who have called from all over the country to complain.

"The government's opponents are unfairly affected when the government abuses the Supreme Court rules," said Edward Steinman, a University of Santa Clara law professor who represents San Francisco residents challenging the ban on federal hiring of aliens.

Bork's brief in that case arrived more than two months behind schedule, despite a 15-day extension. But the Supreme Court clerk refused to extend Steinman's time more than 18 days.

Lawyer's in two cases have done more than complain. They recently filed formal motions asking for dismissal of their cases, which the government had appealed to the Supreme Court after losing in lower courts.

Attorneys for Raymond G. DeChamplain, an Air Force master sergeant accused of spying, told the court that DeChamplain would spend extra time in prison because of Bork's delay in filing the government brief.

DeChamplain has already been imprisoned three years, although his first conviction was reversed and a federal court halted the second court-martial when the government refused, on national seucrity grounds, to share some evidence with the defense lawyers. The government appealed the injunction.

When DeChamplain's attorneys asked for dismissal of his case, Bork had already received a three-week extension in filing time and then had missed the new deadline without bothering to ask for a further extension. The brief finally came in Sept. 30, seven weeks after it was originally due and a month after the extension ran out.

Citing the "long history of failure on the part of the government to comply with the filing requirements of this court," DeChamplain's lawyers said Bork should not be given "one more chance."

"The government should be made to suffer the penalty imposed upon any litigant who arrogantly refuses to comply with the rules of the court," they said. "Dismissal of the appeal is the only proper remedy."

Nevertheless the court refused to dismiss the case Oct 15, with only Douglas dissenting. A similar motion, in a case involving the rights of Indian tribes to regulate the sale of liquor on their reservations, was also turned down. In that case, the government obtained two extensions and still filed six weeks late.

Court insiders said the justices' refusal to dismiss such cases from their docket did not mean they would tolerate future government delays. Some justices apparently believe Bork will be dealt with sternly.

Justice Harry A. Blackmun, speaking informally to law students last week in Atlanta, said the court might be forced to take the drastic step of refusing to accept tardy briefs from Bork if the delays continued.

Aside from turning down briefs and dismissing government appeals, there is nothing the court can do to discipline Bork. He is an officer of the executive branch and subject only to presidential removal.

Because the government is a party—petitioner, respondent, or friend of the court—in nearly half the cases before the justices, the tardiness causes delays•

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

ROBERT H. BORK
UNITED STATES CIRCUIT JUDGE

October 5, 1987

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is in response to Senator Byrd's questions concerning my views on campaign finance. Initially, I should point out that, as Solicitor General, I signed a brief on behalf of the Federal Election Commission, defending the Federal Election Campaign Act against a First Amendment challenge. I also signed an amicus brief on behalf of the Attorney General setting forth the general analytical framework relevant to the decision of the case. The case to which I am referring is, of course, Buckley v. Valeo, 424 U.S. 1 (1976).

Subsequent to my leaving the post of Solicitor General, I have made some public statements critical of some aspects of Buckley. I believe that you will find my disagreement was with certain of the details of the regulatory scheme and some of the justifications offered for the detailed regulation of core First Amendment political activities, rather than with campaign finance reform generally.

(1.) With regard to Federal Election Campaign Act's limitations on contributions to political campaigns, I remarked in a speech at the University of Michigan in 1979 that I found the dual justification of limiting "corruption and the appearance of corruption resulting from large individual financial contributions" to be "very strange."[1] I regarded the severity of the contribution limitation as an impediment toi engaging freely in political speech, because, as I argued, political contributions permit the donors to "increase speech" with which they agree by amplifying the voices of those who will most effectively make the points sought to be made. Thus, I viewed such regulations as "direct limitations upon the amount and effectiveness of political speech."[2]

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[1] University of Michigan Speech at 27.

It was therefore with reference to what I regarded as the extreme nature of the limitations actually imposed on political speech that I considered it as odd that the Court accepted the reasons that it did for the restraint. I wish to be very clear on this point. I regard the limitation of corruption in government as an important governmental interest. However, I believed that the severe contribution limitation was not narrowly tailored to the interest of eliminating actual corruption, because a disclosure requirement, by exposing to the voting public any attempt to purchase political influence, would adequately serve that goal in a manner less intrusive of free speech. I would also wholeheartedly endorse certain measures to eliminate the appearance of corruption. But I found it strange to accept the elimination of the _appearance_, rather than the _actuality_, of corruption as a justification for the really very draconian limitations that were placed on contributions in the Act.

(2.) You have also asked whether I believe that a contribution of $100,000 might not, even in a presidential campaign, induce corruption on the part of a donor or candidate, particularly if the contribution is not required to be disclosed. First, I believe that politicians are generally honest, and contributors, even of large amounts, are usually seeking to amplify the voices of those who can most effectively express the political message that the donor wants to convey. Putting that aside, however, I acknowledge that a large donation, such as the amount cited by you, could present the problem of corruption if made in secret and undisclosed. Without public disclosure, I agree that unsavory deals might in some cases be made at such a price, and that prophylactic measures are useful to prevent corruption under these circumstances.

As I stated in my 1979 speech, however, I believe that disclosure of such large contributions would adequately serve the policy goal of preventing corruption by putting sources of financial support on public record and subjecting to public scrutiny any untoward favoritism to such political patrons.[3] With full disclosure to the public, it seemed unlikely to me that any politician would take the politically suicidal move of selling his or her vote for even as much as $100,000. I have also observed that the extremely low level of contributions necessary to trigger the disclosure requirement may itself pose constitutional problems to the extent that it is so low that it reaches a large class of very small contributions as to which corruption would be unthinkable, but at the same time threatens to chill the speech of the contributor who may wish to express his support anonymously. Federalist Society Symposium, Mar. 7, 1986, at 6. Obviously, these matters involve a large measure of difficult line drawing, and therefore, the briefs and argument in such a case would take on particular importance.

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[2] _Id_. at 26-27.

[3] _Id_. at 28.

(3.) Similarly, you ask about a remark made in the question and answer period during my 1986 talk at the Federal Society, in which I discounted the likelihood of bribery "no matter what size range that you pick" for a contribution. First, I did not foreclose the possibility of bribery when large contributions are involved. Second, I was again operating on the assumption of a system in which very large contributions must be disclosed to the public, and in which severe criminal penalties are enforced for actual bribery. Third, I went on to explain my view that a contribution is generally a means of amplifying a political message by supporting one who is particularly adept at presenting the message which the donor endorses.[4] I offered that theory as what I believed to be a more plausible alternative to the bribery theory of what motivates even very large political contributions.

I left the door open by stating that, if the premise of likely corruption were proved, I felt that it would be in "a size range if there were any, much, much higher than anything contemplated by current law."[5] Indeed during my prepared remarks that evening, I stated my disagreement with the Court's approval of the current, extremely low level of contributions as a basis for an anti-corruption rationale. I stated:

> The political corruption rationale for the regulation of contributions is perhaps not as potent as the Court supposes. The amounts that are regulated are far below anything

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[4] Federalist Society Symposium, Mar. 7, 1986, at 57.

[5] *Id*.

> that could be expected to result in purchasing anybody's vote on an issue.[6]

This quote reflects that there may be some levels at which contributions could purchase votes on an issue, and suggests that some regulation might well be constitutional. I should stress that I was discussing past decisions and not suggesting that I would favor overruling those decisions in the future. Too often in this confirmation process, people have assumed that I want to overrule any case whose reasoning I have ever criticized. That is not true, and I discussed at length with the Committee the fact that precedent is to be respected and the considerations that must be weighed before engaging in the serious act of overruling any precedent.

(4.) I fully recognize the need to prevent, as you put it, "serious adverse effects on the political process." As I have stated, for example, I believe that the government has a compelling interest in stemming political corruption, and Congress may, of course, adopt suitable laws to require disclosure of large campaign contributions, coupled with the application of severe criminal penalties for actual bribery. I do not believe, however, that the Supreme Court has tolerated laws designed to prevent the "undue influence" of some elements of society on the political process. That would pose the inherent danger of a government punishing its political enemies or censoring those with whom the ruling hierarchy disagrees.

In Buckley v. Valeo, 424 U.S. 1, 48 (1976), the Court rejected the argument that "equalizing the relative ability of individuals and groups to influence the outcome of elections" could justify portions of the Act limiting the amount that an individual could spend relative to an identified candidate. Eight members of the Court unambiguously stated that "the concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 48-49. Similarly, in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), the Court invalidated a state statute limiting corporate expenditures to influence certain kinds of public referenda. Justice Powell's majority opinion rejected the argument that the restrictions were justified because "corporations are wealthy and powerful and their views may drown out other points of view." *Id.* at 789. Short of record evidence that such corporate advocacy would undermine the democratic processes, Justice Powell concluded that the tonic for any such excessive corporate "influence" was the good judgment of our citizens in assessing the relative merits of arguments presented to them. Id. at 789-92.

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[6] *Id.* at 6.

(5.) I do not recall that I intended to single out any group or groups in stating that the shifts of political power effected by the Act "were intended." This was merely a casual, rhetorical observation. I do not recall that I relied on any particular evidence to support this rhetorical point. I do believe that a number of commentators have noted that this is the clear effect of the law.

(6.) I articulated a theory of campaign contributions in my 1979 speech at the University of Michigan. I argued that "[t]he important function of a contribution is to increase speech that the contributor agrees with, speech that is more persuasive than his own voice could ever be, speech by a political leader or one in the process of becoming a political leader in a way the contributor can never be and does not wish to be."[7] In sum, "it's a question of getting speech out effectively."[8] This is not to say that money is the same as speech, but, to borrow from my concurring opinion in Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), it is essential in the area of political speech to apply the First Amendment to modern circumstances. As I said in my 1979 speech, "[t]he hard fact of modern politics is that without money there is no speech."[9] Virtually every means of communicating ideas in today's mass society requires the expenditure of money, and suppressing the ability of a person or a group to spend money to support the expression of favored ideas suppresses the communicative power of that person or group.

To illustrate, almost no one would urge that the government should restrict the amount of money that a person could donate to a particular public interest group or to a number of groups. That is because the contributions of individuals to such political advocacy groups provide the means by which diverse persons assemble in order to communicate effectively. The ability of like-minded people to express themselves collectively means that their voices can be fully heard in our society. As I noted at the Federalist Society last year, there is little danger that in our highly pluralistic society, "any major, even minor, point of view is going to go unfunded."[10]

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[7] University of Michigan Speech at 26-27.

[8] Federalist Society Symposium, Mar. 7, 1986, at 58.

[9] University of Michigan Speech at 25.

(7.) As I have stated, a campaign contribution may be the essential means by which a campaign donor engages in effective political discourse. If a donor contributes a given sum to a candidate and some of the money goes to poll taking, rent, or utilities, that money is still going to help the candidate to get his or her message across, and it is the message that the donor is trying to support. Many things that are not speech per se in our society qualify for First Amendment protection because they are closely related to speech. Thus, as I stated in 1979, renting out an auditorium is not itself speech, but the ability of the auditorium owner to rent the auditorium for political debate nonetheless implicates a very significant First Amendment interest.[11]

Sincerely,

Robert H. Bork

Robert H. Bork

RHB/jac

cc: Senator Robert C. Byrd
Senator Strom Thurmond

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[10] Federalist Society Symposium, Mar. 7, 1986, at 58.

[11] University of Michigan Speech at 27.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON D C 20001

ROBERT H BORK
UNITED STATES CIRCUIT JUDGE

October 5, 1987

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter responds to Senator Simon's letter of September 25, 1987, asking for my views on the televising of Supreme Court proceedings. I have never really considered whether Supreme Court proceedings should be televised. As you mention in your letter, there are many factors that the Court should consider as it weighs the issue of televised proceedings. I would approach this issue in much the same way as Chief Justice Rehnquist and Justice Scalia did. If confirmed, I would give full and sympathetic consideration to the issue of televising Supreme Court proceedings.

Sincerely,

Robert H. Bork

RHB/jac

COMMITTEES
LABOR AND HUMAN RESOURCES
JUDICIARY
FOREIGN RELATIONS
BUDGET

United States Senate
WASHINGTON, DC 20510

September 23, 1987

Hon. Robert Bork
United States Court of Appeals
  for the District of Columbia Circuit
U.S. Courthouse
Third Street and Constitution Avenue
Washington, D.C. 20001

Dear Judge Bork:

At last year's confirmation hearings on the nomination of Justice Rehnquist as Chief Justice and Judge Antonin Scalia as associate justice, both nominees were asked their views on televising Supreme Court proceedings.

Following are the answers given by the nominees to this question:

> Judge Rehnquist: "If I were convinced that coverage by television of the Supreme Court would not distort the way the court works at present, I certainly would give it sympathetic consideration."
>
> Judge Scalia: "If confirmed, I would, of course, want to consult my colleagues on this matter, but would be inclined to agree with Justice Rehnquist. As chairman of the Administrative Conference, I recommended the televising of important open agency proceedings to the extent there was an audience for them."

There are many factors that the Court has to consider as it weighs the issue of televised proceedings, and there may well be sufficient reasons to make such a step inadvisable. However, my colleagues and I would appreciate knowing your initial views on this matter for the purposes of the hearing record.

Cordially,

Paul Simon
U.S. Senator

230 S. Dearborn
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Suite 212
East St. Louis, IL 62203
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Room 115 B
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3956 United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

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[illegible]

September 25, 1987

Hon. Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

At last year's confirmation on the nomination of Justice Rehnquist as Chief Justice and Judge Anton Scalia as associate justice, both nominees were asked their views on televising Supreme Court proceeedings.

Following are the answers given by the nominees to this question:

> Judge Rehnquist: "If I were convinced that coverage by television of the Supreme Court would not distort the way the court works at present, I certainly would give it sympathetic consideration."
>
> Judge Scalia: "If confirmed, I would, of course want to consult my colleagues on this matter, but would be inclined to agree with Justice Rehnquist. As chairman of the Administrative Conference, I recommended the televising of important open agency proceedings to the extent there was an audience for them."

There are many factors that the Court has to consider as it weighs the issue of televised proceedings, and there may well be sufficient reasons to make such a step inadvisable. However, my colleagues and I would appreciate knowing Judge Bork's initial views on this matter for the purpose of the hearing record.

Cordially,

Paul

Paul Simon
U.S. Senator

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON D C 20001

ROBERT H BORK
UNITED STATES CIRCUIT JUDGE

October 5, 1987

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter responds to the Senate Judiciary Committee's request of October 1, 1987, asking for my views on whether Congress and/or state legislatures have authority under the Constitution to proscribe unfair advertising even in situations where the advertising is truthful and non-deceptive. Specifically, I have been asked to comment on whether my views on this issue differ from the Supreme Court's in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of New York*, 447 U.S. 557 (1980), and *Posadas de Puerto Rico Assocs.* v. *Tourism Co. of Puerto Rico*, 106 S. Ct. 2968 (1986).

In the course of my testimony before the Senate Committee on the Judiciary, and in the other discussions I have had with members of the Senate, I have described my general approach to analyzing legal problems and deciding cases. I have also elaborated upon the reasoning in the articles, speeches, and judicial decisions which I have written. I have refrained from commenting specifically on other matters which might come before me on the United States Court of Appeals, or, if I am confirmed, on the United States Supreme Court. Because the issue of unfair advertising may come before either the Supreme Court of the Court of Appeals, I believe it would be inappropriate for me to discuss these issues.

Sincerely,

Robert H. Bork

RHB/jac

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON D C 20001

ROBERT H BORK
UNITED STATES CIRCUIT JUDGE

October 5, 1987

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter responds to Senator Metzenbaum's questions asking for my views on the purpose and effect of the Second Amendment. I have never thought about how the Second Amendment should be interpreted. I have never taught the subject and have never decided a case under that amendment. Given these facts, it would be inappropriate for me to try to develop a position now without benefit of research, briefing, and argument.

Sincerely,

Robert H Bork

Robert H. Bork

RHB/jac